COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS

1980

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1980

Chairman.....PAUL E. WATERS

Member.....THOMAS M. BURKE

Member.....DENNIS J. HARNISH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1980 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1980.

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

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

(e) Hearings of the Environmental Hearing Board shall be conducted in accordance with rules and regulations adopted by the Environmental Quality Board and such rules and regulations shall include time limits for taking of appeals, procedures for the taking of appeals, location at which hearings shall be held and such other rules and regulations as may be determined advisable by the Environmental Quality Board.

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

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

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* and the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq.* and reviews the Department's assessments of civil penalties under Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S. 6018.605 and under Section 13 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, *as amended*, November 30, 1971, 52 P.S. 1396.22.

Although the Board is made, by §62 of the Administrative Code, 71 P.S. 62 an administrative board within the Department of Environmental Resources, it is functionally and legally separate and independent. Its Chairman and two members are appointed directly by the Governor, with the consent of the Senate[1] and their salaries are set by statute.[2] Its

---

1. Administrative Code, §472.71 P.S. §180-2.

2. Act of September 2, 1961 (P.L. 1177, No. 525) *as amended* November 8, 1971 (P.L. 535, No. 138).

secretary[3] is appointed by the Board with the approval of the Governor.

The department is a party before the Board in most cases.[4] Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties.

---

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

4. 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).

TABLE OF CASES REPORTED IN THIS VOLUME

ADJUDICATIONS

TABLE OF CASES REPORTED IN THIS VOLUME

ADJUDICATIONS (CONTINUED)

OPINIONS AND ORDERS

TABLE OF CASES REPORTED IN THIS VOLUME

OPINIONS AND ORDERS (CONTINUED)

INDEX

1980 ADJUDICATIONS

INDEX

1980 OPINIONS AND ORDERS

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

UNITED STATES STEEL CORPORATION : Docket No. 78-165-B

: AIR POLLUTION CONTROL ACT

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Thomas M. Burke, January 4 , 1980

This matter is before the board on an appeal by the United States Steel Corporation from the Department of Environmental Resources' (DER) denial of its application for a determination that fugitive emissions from a coke oven pushing operation at its Fairless Works, Fairless Hills, Bucks County, are of minor significance.

DER has moved to dismiss USSC's appeal on the grounds that the application, as a matter of law, fails to meet the requirements of the applicable regulations. The board has the authority to grant a motion to dismiss where on an appeal challenging the validity of a DER action, there is a showing by the DER that there is no genuine issue as to any material fact and that DER is entitled to judgment as a matter of law. *Summerhill Borough v. Commonwealth of Pennsylvania, DER,* 34 Pa. Commonwealth Ct. 574 , 383 A.2d

1320 (1978) and *Associates Commercial Corporation v. DER*, EHB Docket No. 79-140-B (issued July 2, 1979).

Both parties have submitted briefs on the motion to dismiss and on the basis of the briefs we enter the following:

FINDINGS OF FACT

1. The appellant is the United States Steel Corporation, with business offices at 600 Grant Street, Pittsburgh, PA.

2. The appellee is DER, the department authorized to administer the Air Pollution Control Act, the Act of January 8, 1960, P. L. 2119, 35 P.S. 4001 *et seq.*

3. The appellant on September 1, 1978 submitted to the DER an application for a determination that fugitive emissions from four air contaminant emission sources at its Fairless Works were of minor significance. The sources included the plant's coke oven pushing operation.

4. The DER by letter dated November 29, 1978 denied appellant's application for minor significance for the coke oven pushing operation for the stated reason that the application failed to comply with Section 123.1(a)(8) of the DER's regulations, 25 Pa. Code 123.1(a)(8).

5. Appellant filed its application for a determination of minor significance pursuant to 25 Pa. Code 123.1(a)(9) and 123.1(b).

6. In paragraph 5E of its application for a determination of minor significance, appellant answered "None" to the question "Description of Control Devices, Control Measures, Enclosures, etc."

7. Appellant in paragraph 9 of the application stated that in order to prevent emissions from the coke oven pushing operation it would "...maintain pushing schedules adequate to insure complete coking prior to pushing oven".

8. Appellant's coke oven pushing operation is not enclosed and the emissions therefrom are not contained.

DISCUSSION

Appellant operates two coke oven batteries at its Fairless Works. Each battery is composed of 87 ovens, attached side by side. Coke is produced in the ovens by cooking coal at approximately 2000°F for about 18 hours. Gases are driven off the coal into a pipeline and collected as a valuable by-product of the operation. What remains, the coke, is about 90% carbon. At the completion of the 18-hour coking period, the doors on both sides of the ovens, which stand approximately 10 feet high, are removed. A machine traveling on rails parallel to the battery lines up with the oven and extends a large ram through the open front door, pushing the coke out the back door and into a railroad gondola car. The coke is taken to a quenching station to be cooled with water. The emissions which are pertinent to this appeal occur as the coke is pushed from the oven into the railroad car. As the coke falls a plume with the appearance of black smoke arises from both the coke mass and the railroad car.

The emissions from the coke oven pushing operation are catagorized by the DER's regulations as "fugitive emissions", that is, they are emitted into the atmosphere in a manner other than through a conduit such as a duct, stack, or chimney. See 25 Pa. Code 121.1.

Fugitive emissions are governed by 25 Pa. Code 123.1. Except for the emissions from nine classes of sources specifically listed therein, Section 123.1 flatly prohibits the occurence of fugitive emissions. The purpose of the prohibition is not to set a zero emission limitation but to force the installation of equipment to collect the emissions and evacute them to the outdoor atmosphere through a stack where they can be measured and thus controlled.

See *Commonwealth of Pa, DER v. Locust Point Quarries, Inc.*, ____ Pa. ____; 396 A.2d 1205 (1979). This controversy centers on the proper construction to be given to the exceptions to the general prohibition of Section 123.1. Section 123.1(a) states as follows:

> (a) No person shall cause, suffer, or permit the emission into the outdoor atmosphere of any fugitive air contaminant from any source other than the folllowing:
> (1) Construction or demolition of buildings or structures.
> (2) Grading, paving, and maintenance of roads and streets.
> (3) Use of roads and streets. Emissions from material in or on trucks, railroad cars, and other vehicular equipment shall not be considered as emissions from use of roads and streets.
> (4) Clearing of land.
> (5) Stockpiling of materials.
> (6) Open burning operations.
> (7) Blasting in open pit mines. Emissions from drilling shall not be considered as emissions from blasting.
> (8) Coke oven batteries, provided the fugitive air contaminants emitted from any coke oven battery comply with the standards for visible fugitive emissions in §§123.44 (relating to limitations of visible fugitive air contaminants from operation of any coke oven battery) and 129.15 (relating to coke pushing operations) of this title.
> (9) Sources and classes of sources other than those identified in paragraphs (1) - (8) of this subsection, for which the operator has obtained a determination from the Department that fugitive emissions from the source, after appropriate control, meet the following requirements:
> (i) the emissions are of minor significance with respect to causing air pollution; and
> (ii) the emissions are not preventing or interfering with the attainment or maintenance of any ambient air quality standard.

Appellant has filed an application under subsection (a)(9) of Section 123.1, requesting the DER to determine that the emissions from the coke oven pushing operation are of minor significance and do not interfere with the attainment of any ambient air quality standards and thus are exempt from the general prohibition against fugitive emissions. The significance of such a determination is that appellant would not have to install air pollution control equipment

on its pushing operation. DER's rejection of the application is based on its contention that coke oven battery emissions are able to be exempted from the general prohibition of fugitive emission only through the mechanism of subsection (a)(8).

Subsection (a)(8) provides for the exemption of coke oven emissions from the general prohibition of 25 Pa. Code 123.1. It exempts coke oven pushing emissions on the condition that the pushing operation complies with 25 Pa. Code 129.15. Section 129.15 sets forth a two-tiered scheme for the control of pushing emissions. Its primary requirement is the installation of air pollution control equipment approved by the DER to enclose the pushing operation and contain the emissions therefrom. It also establishes a procedure whereby any residual emissions may be exempted from control, if the DER, upon application from the operator, determines that the emissions are of minor significance. Section 129.15 states:

> (a) No person shall cause, suffer, or permit the pushing of coke from a coke oven unless the pushing operation is enclosed during the removal of coke from a coke oven and pushing emissions are contained, except for such fugitive pushing emmissions, [sic] as are allowed by subsections (c) and (d) of this section. Any device for the enclosure of pushing operations shall be subject to the requirements of Chapter 127 of this title (relating to construction, modification, reactivation, and operation at sources) and the grant of plan approval.
>
> (b) Any application submitted to the Department pursuant to Chapter 127 of this title (relating to construction, modification, reactivation, and operation of sources) for approval to install an air cleaning device designed to achieve compliance with subsection (a) of this section at an existing coke oven battery shall, in addition to the requirements of §123.13(b) (relating to processes) and §127.12(a) (relating to content of applications) of this title, show that the air cleaning device is designed to reduce the fugitive emissions from pushing operations at any battery to the minimum attainable through the use of the best available technology following control.

(c) Visible fugitive air contaminants in excess of 20% opacity from any air cleaning device installed for the control of pushing emissions pursuant to a plan approval from the Department shall be prohibited unless the Department finds that:

(1) the emissions are of minor significance with respect to causing air pollution; and

(2) the emissions will not prevent or interfere with the attainment or maintenance of any ambient air quality standard.

(d) Application for a finding under subsection (c) of this section shall be filed in accordance with §123.1(b) of this title (relating to prohibition of certain fugitive emissions).

(e) No person shall transport hot coke in the open atmosphere during the pushing operation, unless the visible fugitive air contaminants from such coke do not exceed 10% opacity.

The DER was correct in its rejection of appellant's request that the DER apply subsection (a)(9) to its coke oven batteries. Subsection (a)(9) limits its own application to "sources and classes of sources other than those identified in paragraphs (1) - (8)" and, as previously discussed, coke oven batteries are identified by paragraph (8). Thus, coke oven batteries are excluded from subsection (a)(9) by its own qualifications on its applicability.

Appellant, in its brief, argues that subsection (a)(8) has applicability to only those coke oven batteries which are in compliance with Section 129.15. Emissions from noncomplying batteries, argues appellant, are subject to subsection (a)(9). Appellant's construction is strained and contrary to the intent of Sections 123.1 and 129.15. The interrelationship between Section 123.1 and Section 129.15 is clear and free of ambiguity. Section 123.1 prohibits fugitive emissions from coke oven pushing operations unless they comply with Section 129.15. Section 129.15 requires the installation of control equipment to contain and clean the emissions. Residual emissions, if any, can be given a minor significance determination by the DER. However, the installation of control equipment is mandatory and a prerequisite to such a determination.

Appellant's construction of Section 123.1 would enable an operator to circumvent the air pollution control installation requirement of Section 129.15. It would also cause an irreconcilable conflict between Sections 123.1 and 129.15. Section 129.15 prohibits the pushing of coke unless the operation is enclosed by control equipment, whereas Section 123.1(a)(9), under appellant's construction, would acknowledge and indeed permit the existence of a pushing operation that lacked pushing emission control equipment. A statute must be construed, if possible, to give effect to all of its provisions. See *Commonwealth of Pennsylvania, DER v. Locust Point Quarries, supra.*

Appellant also contends that, if given the opportunity, it would be able to demonstrate that the pushing emissions can be controlled by improved operating practices and procedures to a level of minor significance. Thus air pollution controls would constitute "control for control sake".

The promulgation of a regulation by the Environmental Quality Board prohibiting or limiting a certain type of emission removes from the DER the discretion to determine whether or not the emission should be controlled. The DER must act in accord with the regulation. Thus, when the Environmental Quality Board promulgated Section 129.15, it determined that the emissions from coke oven pushing operations are harmful and must be captured and contained. It removed from the DER the discretion to make such a determination on an individual basis. See *Scott Paper Co. v. DER*, EHB Docket No. 78-107-D, (issued November 30, 1978). *Anthony Agosta, et al. v. DER*, EHB 75-208-W (issued March 25, 1977) and *County Commissioners of Delaware County v. DER*, 74-261-B (issued October 23, 1975). In *Scott Paper Co. v. DER, supra*, we stated:

> ...Though DER may propose rules and regulations for adoption by the EQB, the action of the EQB in adopting such regulations is the action of a separate administrative body within DER. Once those rules and regulations are adopted they become the rules under which DER must operate..." 10 at page 5.

In conclusion, a coke oven pushing operation must comply with the terms of 25 Pa. Code 129.15. An operator does not have the option of ignoring 129.15 and filing an application for a determination of minor significance under 123.1(a)(9). As appellant's application for a determination of minor significance cannot be reviewed under Section 123.1(a)(9) and since the application does not comply with the requirements of Section 123.1(a)(8), the DER, as a matter of law was required to deny it.

CONCLUSIONS OF LAW

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

2. The board has the authority to grant a motion to dismiss where on an appeal challenging the validity of a DER action, there is a showing by the DER that there is no genuine issue as to any material fact and that DER is entitled to judgment as a matter of law.

3. The "minor significance" exception to the general prohibition against fugitive emissions set forth in 25 Pa. Code 123.1(a)(9) does not apply to coke oven batteries.

4. 25 Pa. Code 123.1(a)(8) specifies the mechanism through which a coke oven pushing operation can be exempted from the general prohibition against fugitive emissions.

5. The promulgation of a regulation by the Environmental Quality Board prohibiting or limiting a certain type of emission removes from the DER the discretion to determine whether or not an emission should be controlled.

6. The Environmental Quality Board made a determination that emissions from coke oven pushing operations are harmful and must be captured and contained when it promulgated 25 Pa. Code 129.15.

7. A coke oven pushing operation must comply with the terms of 25 Pa. Code 129.15.

ORDER

AND NOW, this 4th day of January, 1980, the motion to dismiss filed by the DER in this matter is granted. The appeal filed by the United States Steel Corporation from the DER's denial of its application for a determination that fugitive emissions from its coke oven pushing operation at its Fairless Works are of minor significance is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

By: THOMAS M. BURKE
Member

DATED: January 4, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HIGHWAY AUTO SERVICE :

Docket No. 79-114-W

The Clean Streams Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Paul E. Waters, Chairman, January 30, 1980

This matter comes before the board as an appeal from an order issued by DER on August 3, 1979, requiring appellant, Highway Auto Service, to cease operations and take other action at its place of business because of pollution discharges and contamination in the Susquehanna River. DER alleges that the leak came, at least in part, from appellant's premises through an underground tunnel but, in any event, the tunnel carried sewage in violation of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.*, which justifies the order. DER further contends that, inasmuch as appellant's business is now in full operation and its order has been complied with, the case is moot.

FINDINGS OF FACT

1. Appellant, Highway Auto Service, is a business operating in Luzerne County, owned by Mr. Terry E. Scatena.

2. Mr. Terry E. Scatena, a/k/a Elmo Scatena, resides at Hillside Street and Route 315, Pittston, PA 18640.

3. Mr. Scatena owns and operates a business establishment known as Highway Auto Service, hereinafter HAS, which is located at the intersection of Interstate Route 81 and Pa. Route 315, Pittston Township, Luzerne County, PA, and which provides certain mechanical services for motor vehicles.

4. The Pittston Water Tunnel, also known as the Butler Tunnel, hereinafter Tunnel, is part of a subsurface mine water drainage system serving the Butler Colliery.

5. The Tunnel is generally located in Pittston Township, Luzerne County, PA, and terminates at the Susquehanna River adjacent to the Jenkins Street Bridge in Pittston, PA, with an opening for mine water drainage.

6. The Butler Colliery comprises an extensive abandoned underground mining area, also located in Pittston Township, Luzerne County, PA, and includes a subsurface mine water drainage system.

7. HAS is located in Pittston Township and is situated above the Butler Colliery and in the immediate vicinity of a portion of the subsurface mine water drainage system which in turn is connected to the Tunnel.

8. The Tunnel originates in the general subsurface vicinity of HAS and directly connects with the Tunnel outfall on the Susquehanna River in the vicinity of the Jenkins Street Bridge.

9. On Sunday, July 29, 1979, an unusual oily substance commenced emanating from the Tunnel into the Susquehanna River and caused a serious pollution incident.

10. In an effort to locate the source of the pollution emanating from the Tunnel, DER initiated certain investigations, one of which involved an investigation of the surface and subsurface area in and around the Butler Colliery

and the Tunnel, in an effort to locate any surface openings leading to the underground mine workings and subsurface mine drainage system.

11. A study of the underground mine workings performed by DER disclosed several possible surface openings to the underground in the immediate vicinity of the HAS.

12. The study of the underground mine workings indicated that a surface opening to the underground mine workings and subsurface mine drainage system was located on or near the premises of HAS which, therefore, was a possible source for the pollution emanating from the Tunnel into the Susquehanna River.

13. On August 2, 1979, representatives of DER visited the premises of HAS and were granted permission from Mr. Terry Scatena to enter and perform investigations on the premises.

14. During the investigation on the premises of HAS on August 2, 1979, DER located a concealed and covered opening or borehole, hereinafter borehole, leading to the underground mine workings.

15. The borehole was located approximately 20 to 30 feet from buildings on the premises of HAS, in a parking area, and was shallowly buried (two to four inches) with a dirt and oil mixture and covered with a metal, lift-off cap.

16. Approximately 18 to 24 inches down from the upper or protruding end of the borehole, two subsurface lateral connecting pipes entered the borehole from the direction of the HAS buildings.

17. During the sampling activities conducted by DER, liquid material was observed entering the borehole from one of the subsurface lateral connecting pipes coming from HAS. It clearly contained sewage wastes.

18. On August 3, 1979, DER issued an order to Mr. Scatena and HAS

which required him, *inter alia*, to cease doing business at HAS on and after August 9, 1979, until a satisfactory waste disposal system was installed, and to immediately allow the agents of DER access to the premises to conduct tests and abate any pollution discovered.

19. At approximately 2:30 P.M. on August 8, 1979, Mr. McDonnell performed a rhodamine dye test at the borehole, which test was witnessed by Mr. Koval, DER.

20. The dye test consisted of the introduction of approximately two to three gallons of rhodamine dye and approximately 2,000 gallons of water under pressure into the borehole.

21. After the introduction of the dye on August 8, 1979, Mr. Joseph Koval left the premises of HAS at approximately 3:30 P.M. and proceeded directly to the Tunnel outfall at the Susquehanna River where, at 4:00 P.M., he commenced sampling the materials discharging from the Tunnel into the river.

22. Mr. Koval sampled continuously from the time of his arrival at the Tunnel around 4:00 P.M. on August 8, 1979, until 6:30 A.M. on August 9, 1979, at which time he recognized evidence of rhodamine dye in the effluent discharge material from the Tunnel.

23. The rhodamine dye placed in the borehole on the premises of HAS exited from the Tunnel approximately 16 hours after its introduction to the borehole.

24. On August 9, 1979, appellant ceased doing business in compliance with the DER Order of August 3, 1979.

25. A supersedeas hearing was continued temporarily when the parties agreed to a stipulation which, *inter alia*, allowed appellant to reopen his business: (1) if an interim sewage system were installed; (2) if an application for an acceptable permanent sewage system were submitted to DER for approval;

(3) if oil or petroleum waste products were disposed of properly; and (4) if the HAS sewer pipe laterals leading into the borehole were sealed.

26. Appellant complied with the terms of the supersedeas and subsequently opened for business and currently remains open for business.

DISCUSSION

Appellant feels a sense of indignation because it was required to close down business operations from August 9 until August 16, 1979, was subjected to accusations and innuendo and was compelled to agree to certain changes on its premises in order to obtain DER's consent to continue operation of a lawful business.

To put this matter in proper context, the board must take note of the fact that the discharges into the Susquehanna River, which caused much alarm during the period in question, were such that immediate action was called for by DER. Although the unusual and indeed unique circumstances here involved do not alter the law which requires that DER not abuse its discretion, the exercise thereof must be viewed in light of all of the known circumstances at the time and not merely with the benefit of the 20/20 vision of hindsight.

DER argues that although the order it issued to HAS was justified and proper, the appeal is now moot and should be so declared by this board and there conclude the matter.

Appellant acknowledges that there is nothing left undone which was re-

quired by the order here under appeal.[1] The borehole has been capped and, there are no further discharges into the Tunnel. Appellant has applied for a sewage permit and its business is in full operation. The question of mootness, then, does continue to loom large in our view of the matter. Appellant makes a persistent argument that the order should never have been issued in the first place, and unless the board reaches and decides the merits of the case, DER might again close down the business operation. Although this issue was discussed at length at both the supersedeas and the final hearings, appellant has yet to indicate what change it would have

---

1. The order provided:

> "NOW, THEREFORE, it is hereby ORDERED, pursuant to Section 1917-A of the Administrative Code of 1929 and Sections 5, 316, 402 and 610 of the Clean Streams Law that "Terry" Scatena and Highway Auto Service and their agents, employees, successors and assigns shall:
>
> "a. Immediately allow the Department and its agents and employees, without fee or hindrance, to enter and to remain on the property of Highway Auto Service for the purposes stated in this Order; and
>
> "b. Immediately remove any cover and any trucks, cars, equipment, debris and/or materials of any kind that may be blocking access to any borehole or opening into underground mine workings located on the property of Highway Auto Service; and, thereafter
>
> "c. Allow the Department and its agents and employees to perform such tests as the Department deems necessary to determine the presence of combustible gases and solid or liquid pollutants in any borehole or opening into underground mine workings on the property; and
>
> "d. Allow the Department and its agents and employees to evacuate any combustible gases that may be found in any borehole or opening into underground mine workings on the property; and
>
> "e. Allow the Department and its agents and employees to take such actions as may be necessary to abate the discharge of solid or liquid pollutants from underground mine workings beneath the property and from the property itself, into waters of the Commonwealth. Such actions include but are not limited to the pumping and temporary storage on the property of pollutants from out of any borehole on the property and the sealing of boreholes; and
>
> "f. On and after August 9, 1979, cease doing business at Highway Auto Service until such time as a waste disposal system that satisfies the requirements of law is approved by the Department, constructed and placed in operation."

this board make in the status quo. In its brief, appellant attacks the Order of August 3, 1979, as abridging substantive and procedural constitutional rights and cites unquestioned authority of this board to conduct hearings and issue adjudications. None of this, however, goes to the underlying question of whether this case is now moot. In support of its argument, appellant cites language from *Fox et al v. Central Delaware County Authority*, 45 Pa. 623.[2] This case might well be cited to support DER. In holding that the appeal in the *Fox* case, *supra*, be dismissed as moot, our Supreme Court, speaking through Justice Packel, said:

> ". . .The old controversy which was litigated, *i.e.*, authority to construct the sewer, is no longer a matter of controversy. It is tersely and cogently pointed out in *Excellent Laundry Co. v. Szekeres*, 382 Pa. 23, 25, 114 A.2d 176, 177 (1955): 'The function of a court is to redress existing wrongs. . . The law is not concerned with matters that have become moot, and the rule is well and wisely established that a court will act only where a real controversy exists.'"

It is well settled law that the existence of an actual controversy is an essential requisite of appellate jurisdiction, and if pending an appeal, events occur which render it impossible for the court to grant any relief, the appeal will be dismissed as moot. 2 P.L.E. Appeals §313. In *Seward v. Shields*, 18 Pa. Super. 384, the court held that where the time limit specified within which defendant was not to engage in business had expired before an appeal from an order refusing a preliminary injunction is brought to a hearing, the appellate court must dismiss the appeal as moot. We believe, that this appeal is moot, but have little doubt that it would not have been concluded

---

2. "The issue before the Administrative Agency and before the Commonwealth Court has been mooted by the authorized construction of the sewer and by the lack of any contention that the present operation of the sewer should be stopped.

to appellant's satisfaction on the merits in any event.[3]

I do not believe that, in all cases, an appeal becomes moot because the appellant complies with the terms of an order pending a hearing on the merits of his appeal. Here, however, appellant has no further obligations under the order and he is unable to affect a change in the completed actions. Thus, there is no relief which we are empowered to give appellant.

We therefore enter the following:

CONCLUSIONS OF LAW

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

2. The appellant presently seeks no relief which this board is empowered to give.

3. All legal requests raised by the Order of August 3, 1979, issued to appellant by DER, have been complied with, and there is no allegation that appellant desires to change the status quo.

4. There being no present controversy between the parties to this appeal, the same is moot.

---

3. Although there is some question as to the evidence regarding pollutants passing into the borehole, there is ample proof that there was an unlawful discharge of sewage from Highway Auto buildings in violation of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.*, 35 P.S. §691.202, §691.307.

O R D E R

AND NOW, this 30th day of JANUARY, 1980, the appeal of Highway Auto Service is hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

BY: PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

DATED: January 30, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HIGH SKY, INC.

Docket No. 79-015-B
Public Eating and
Drinking Law

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By Thomas M. Burke, Member, April 23, 1980

High Sky, Inc. has appealed from the Department of Environmental Resources' (DER) denial of its application for a public eating and drinking place license for a restaurant and bar known as the Congeniality Center. DER listed two reasons for its denial: (1) the facility is not served by an approved sewage disposal system; and (2) the appellant failed to submit the required plans and specifications to the DER for its review.

FINDINGS OF FACT

1. Appellant is High Sky, Inc. (High Sky), a corporation with an address at P.O. Box 43, Numidia, Columbia County, Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (DER), the agency entrusted with the power and duty to administer the Public Eating and Drinking Act, the Act of May 23, 1945, No. 369, P.L. 926, *as amended*, 35 P. S. 655, *et seq.*

3. In 1973, High Sky constructed a facility in Locust Township, Columbia County known as the Congeniality Center. The Center has been used until the present time as a common area for serving coffee and the like to prospective customers at High Sky's vacation home development.

4. High Sky desires to use the Congeniality Center as a public restaurant and bar.

5. A subsurface disposal system was installed to serve the Congeniality Center during July 1973.

6. Locust Township was the local agency responsible for administering the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, No. 537, *as amended*, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act), including the issuance of sewage system permits, in 1973.

7. Harold Getty was the sewage enforcement officer of Locust Township during the time of installation of the sewage disposal system at the Congeniality Center.

8. The secretary of Locust Township and custodian of its records, Whitaker, received carbon copies of all sewage system permits issued by Getty in 1973. The secretary of Locust Township received no copy of a permit or other record issued by Getty, the sewage enforcement officer, to High Sky for its Congeniality Center.

9. Locust Township has not issued a permit to High Sky for the installation of a sewage disposal system to serve the Congeniality Center.

10. Raymond E. Webb installed the subsurface sewage system at the Congeniality Center. Webb's recollection is that the only permit issued for the system was signed by Merlyn Jenkins.

11. Jenkins was never employed by Locust Township. Jenkins never had any authorization to issue a sewage permit in Locust Township.

12. The DER never issued a permit for a sewage system for the Congeniality Center.

13. The subsurface sewage system serving the Congeniality Center has never been permitted.

14. The whereabouts of plans and specifications for the subsurface system at the Congeniality Center is unknown. However, Webb's recollection is that the septic tank has a liquid capacity of 1,000 gallons, the absorption field was constructed by the trench method and the square footage of the absorption field is about 900 square feet.

15. The seating capacity for dining patrons at the Congeniality Center is approximately 150 persons and the seating capacity for the bar is approximately 40 persons.

16. A septic tank for this type of establishment and number of patrons should be sized at 2,800 gallons.

17. An absorption field for this type of establishment and number of patrons should be sized at 1,700 square feet, assuming the most beneficial absorption rate possible.

18. High Sky submitted a set of architectural drawings prepared by Mariano Martinez, registered architect, as part of its application for a license.

19. The architectural drawings did not show such restaurant and bar equipment as a sink, stove and dishwasher.

DISCUSSION

Section 2 of the Public Eating and Drinking Act, the Act of May 23, 1945, P.L. 926, 35 P.S. 655.2, (Act), prohibits the operation of a restaurant or bar without the operator first obtaining a license. In municipalities not served by a county health department, the licenses are issued by the DER. See Section 2 of the Act and Section 1901-A of the

Administrative Code, the Act of December 3, 1970, P.L. 834, 71 P.S. 510-1. The DER is empowered by Section 3 of the Act to refuse to issue a license if the premises or equipment do not comply with the requirements of the rules and regulations promulgated under the Act.

Here, the principal reason for DER's refusal to issue the license is appellant's inability to demonstrate that the Congeniality Center is served by an adequate sewage disposal system. DER regulation 25 Pa. Code 151.73 requires that the sewage disposal system serving a public eating and drinking place must be permitted and the permit must be based on compliance with the DER regulations which set forth the standards for adequate performance of on-lot systems.

The Congeniality Center is served by an on-lot subsurface system installed in July 1973, when the Center itself was constructed. The sewage system has never been permitted by the local municipality as is required by the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. 750. Nor is appellant able to produce the plans and specifications detailing the size and location of the sewage system. Nevertheless, appellant contends that the status of the sewage system cannot be grounds for disapproval of the license because the installation of the sewage system was approved by a DER Sanitarian in July 1973.

The system was installed by Raymond Webb. Webb testified that no actual permit was issued for the system but that a DER Sanitarian, who is now deceased, arrived at the site after the system was installed and told Webb "Go ahead and cover it." Webb explained the oral approval by saying that things were done rather informally at that time.

The DER Sanitarian did not have the authority to approve the

system. Under the Sewage Facilities Act, *supra*, the permits are issued by the local municipality not the DER. Assuming that the sanitarian did give approval for the sewage system, the DER is not bound by his action. The DER is not estopped from performing its regulatory duties by prior improper acts of its employees. Certainly rules necessary for the protection of the public health cannot be abbrogated because of prior improper acts of DER employees. See *Commonwealth of Pennsylvania v. Western Maryland R. R. Co.*, 372 Pa. 312, 105 A.2d 336, cert. denied, 348 U.S. 857 (1954), *Commonwealth of Pennsylvania v. D.P.W. v. UEC, Inc.*, ___ Pa. ___, 397 A.2d 779 (1979) and *Michael Pawk v. DER*, EHB Docket No. 74-052-D, issued May 13, 1977.

Obviously, the public health necessitates that restaurants be served by proper sewage disposal systems. The potential for harm is illustrated here by the fact that the distance separating the on-lot sewage system absorption field from the well supplying the restaurant's water is unknown. Webb doesn't recall the distance between the well and the absorption field and the plans can't be located. Also, it appears from the testimony that there is a strong likelihood that the sewage system is undersized. Webb testified that the septic tank has a liquid capacity of 1,000 gallons and the size of the absorption field is 900 square feet. The DER's regulations require that a septic tank for this size facility should have a capacity of 2,800 gallons and an absorption field of 1,700 square feet.[1] Although we are skeptical of Webb's testimony on the system's specifications since he testified completely from memory about an installation which took place seven years ago, his testimony

---

1. See 25 Pa. Code 73.64(a), 73.31(c) and 73.91.

does point out a need to determine the system's capability.

Therefore, since appellant does not have a permit for the sewage system serving the Congeniality Center and since appellant is unable to produce any plans or specifications to show whether the sewage system conforms to the DER's regulations governing these systems, the DER has no discretion, as a matter of law, but to reject appellant's application for a public eating and drinking place license.

Appellant's remedy is to uncover the subsurface system in conjunction with an application for a permit for the system from Locust Township. If the system is undersized, it will have to be supplemented.

The DER also based its denial on appellant's failure to submit plans and specifications for the Congeniality Center which include certain information required by DER's regulation 25 Pa. Code 151.101.

25 Pa. Code 151.101 provides in part:

> "(a) Before work is begun in the construction...of an eating or drinking place where food is prepared, stored or served...properly prepared plans and specifications shall be submitted to and approved by the licensor.
>
> "(b) The plans and specifications submitted to the licensor by the owner of a future eating or drinking place shall include, where applicable, data relating to the following:
>
> "(1) Surrounding grounds.
> "(2) Building.
> "(3) Equipment.
> "(4) Sewage disposal.
> "(5) Water supply, including plumbing.
> "(6) Refuse disposal.
> "(7) Any other such information required by the licensor."

Appellant did submit architectural drawings of the Congeniality Center. However, the drawings do not include information on such restaurant and bar equipment as sinks, stoves and dishwasher.

The data specified by 25 Pa. Code 151.101 is needed by DER to

enable it to determine if the applicant's facility and equipment are able to be operated in a sanitary manner.

At the hearing on the merits, we opined that this objection could be resolved if appellant supplemented or revised the drawings to show the type and location of the specified equipment. Although appellant stipulated that it would file the necessary revision to the drawings, it has not done so.

Therefore, the DER's reason for refusing appellant's application for license based on noncompliance with 25 Pa. Code 151.101 is also sustained.

CONCLUSIONS OF LAW

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

2. The DER has no discretion but to deny an eating and drinking place license where the applicant has not submitted sufficient documentation to demonstrate that the proposed eating and drinking place will provide sanitary treatment and service of food or drinks to the public.

3. Where DER Regulation 25 Pa. Code 151.73 requires that all sewage disposal systems serving public eating or drinking places must be approved by the licensor and that the approval must be based upon satisfactory compliance with the DER regulations governing sewage disposal systems, the DER may properly require an applicant for an eating and drinking place license to submit a sewage system permit as proof that said system complies with applicable regulations.

---

2. See DER's Motion to Supplement the Record.

4. The local municipality has the responsibility to issue permits under Section 7 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, 35 P.S. 750.1 *et seq.*

5. Under the facts of this case, the DER is not estopped from performing its governmental functions by prior improper acts of its employees.

ORDER

AND NOW, this 23rd day of April 1980, the appeal of High Sky, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: THOMAS M. BURKE
Member

DATED: April 23, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

UNITED STATES STEEL CORPORATION : Docket No. 79-154-B

: CLEAN STREAMS LAW

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Thomas M. Burke, Member, May 23, 1980

United States Steel Corporation ("USSC") has filed an appeal with this board from an action taken by the Environmental Quality Board ("EQB") which adopted regulations amending 25 Pa. Code Chapters 93, 95 and 97 to establish state water quality standards for all waters of the Commonwealth including "waters into which appellant discharges effluents from its mining and manufacturing facilities". The EQB adopted the regulations in an order dated August 21, 1979; the order provided that the regulations would become effective on October 8, 1979. The EQB's order and accompanying regulations were published in the September 8, 1979 edition of the Pa. Bulletin (9 Pa. B. 3051 *et seq.*). On October 9, 1979 appellant filed its appeal with this Board; it listed eight reasons why it believes the regulations adopted by the EQB are arbitrary, capricious and unreasonable.

The Department of Environmental Resources ("DER") on October 24, 1979 filed a motion to quash appeal on the basis that the board has no jurisdiction to hear the appeal. Briefs have been filed by both parties.

The DER argues, and we agree, that this Board lacks jurisdiction over USSC's appeal because: (1) the board has no jurisdiction to review actions of the EQB and (2) the board has no jurisdiction to review the adoption of a regulation.

This is not a case of first impression; we recently decided in *Scott Paper Company v. DER*, EHB Docket No. 78-107-D (issued December 1, 1978) that we lack jurisdiction to review a regulation promulgated by the EQB. We stated at p. 2 of the *Scott Paper Company* opinion:

> "Whatever may be the desirability of providing for review of regulations adopted by the Environmental Quality Board, the law of Pennsylvania does not provide for such review until a regulation is applied in a particular case. *United States Steel Corporation v. Commonwealth of Pennsylvania*, EHB Docket No. 75-170-C (issued April 27, 1977); *West Penn Power Company v. Commonwealth of Pennsylvania, DER*, EHB Docket No. 73-330-D opinion and order issued February 25, 1977; *St. Joe's Mineral Corporation v. Goddard*, 14 Pa. Commonwealth Ct. 624, 324 A.2d 800 (1974)....The Pennsylvania Administrative Agency Law, Act of June 4, 1945, P.L. 1388, *as amended*, 71 P.S. §1710.1 *et seq.* provides only for review of "adjudications" or (sic) administrative agencies and does not similarly provide for the review of regulations adopted by administrative agencies; and the case law in Pennsylvania has held that such regulations are not reviewable on their adoption, but only on their enforcement in a particular proceeding. *Insurance Company of North America v. Commonwealth Insurance Department*, 15 Pa. Commonwealth Ct. 462, 327 A.2d 411 (1974); *Pennsylvania R.R. Co. v. Pennsylvania Public Utility Commission*, 396 Pa. 34, 152 A.2d 422 (1959); *Redmond v. Commonwealth, Milk Marketing Board*, Pa. Commonwealth Ct. , 363 A.2d 840 (1976); *Pittsburgh v. Blue Cross of Western Pa*, 4 Pa. Commonwealth Ct. 262, 286 A.2d 475 (1971) rev'd on other grounds *sub nom.*
>
> "In keeping with that general principle of administrative law in Pennsylvania, it appears clear from the legislation establishing the Environmental Hearing Board that its jurisdiction extends only to review of

adjudicatory actions taken by DER and not to review of legislative action taken by the Environmental Quality Board."

Appellant argues that we should reverse our decision in *Scott Paper Company* because: (1) an action of the EQB is in fact an action of the DER and thus appealable to the board under Section 1921-A of the Administrative Code the Act of December 3, 1970, P.L. 834, No. 275 71 P.S. 510-21; (2) the board's reliance on the Commonwealth Court's decision in *Insurance Company of North America v. Commonwealth Insurance Department*, 15 Pa. Commonwealth Ct. 462, 327 A.2d 411 (1974) is misplaced for reason that the board failed to consider the "organizational difference between the DER and the Insurance Department"; and (3) an appeal to the board of the EQB adoption of the regulations is required by due process.

I

The administrative mechanism for the implementation of the environmental protection statutes in Pennsylvania is unique in that the General Assembly created separate agencies to perform the administrative, legislative and judicial functions.[1] The DER administers and enforces the environmental programs and

---

1. Environmental Protection is the only administrative regulatory program in Pennsylvania which separates the investigative, legislative and adjudicative functions into separate agencies. The genisis of the separation may be warnings, at the time of its creation, by Pennsylvania and federal court decisions that the comingling of such functions may create such a risk of bias as to constitute a due process violation. See *Schlesinger Appeal*, 404 Pa. 584, 172 A.2d 835 (1961); *Gardner v. Repasky*, 434 Pa. 126, 252 A.2d 704 (1969) and *In re Murchison*, 349 U.S. 133 (1955). The Taft-Hartley Law separated the office of General Counsel from the National Labor Relations Board in order to prevent the prosecuting attorney from having ex-parte influence upon final decisions of the Board. See however recent cases which hold that the comingling of functions does not, by itself, overcome the presumption of integrity in public officials. C.f. *Withnow v. Larkin*, 421 U.S. 35 (1975).

sets the policy for their implementation[2] but, as distinguished from other administrative agencies, it does not have rulemaking or adjudicatory authority. The rulemaking authority is vested in the EQB by Section 1920-A of the Administrative Code, Act of April 9, 1929, P.L. 177, 71 P.S. 510-20.

> "§510-20. (Adm. Code §1920-A). Environmental Quality Board
>
> (a) The Environmental Quality Board shall have the responsibility for developing a master environmental plan for the Commonwealth.
>
> (b) The Environmental Quality Board shall have the power and its duties shall be to formulate, adopt and promulgate such rules and regulations as may be determined by the board for the proper performance of the work of the [DER], and such rules and regulations, when made by the board, shall become the rules and regulations of the department.
>
> (c) The board shall continue to exercise any power to formulate, adopt and promulgate rules and regulations, heretofore vested in the several persons, departments, boards and commissions set forth in section 1901(a) of this act, and any such rules and regulations promulgated prior to the effective date of this act shall be the rules and regulations of the Department of Environmental Resources until such time as they are modified or repealed by the Environmental Quality Board.
>
> (d) The board shall have the power to subpoena witnesses, records and papers and upon certification to it of failure to obey any such subpoena the Commonwealth Court is empowered after hearing to enter, when proper, an adjudication of contempt and such other order as the circumstances require.
>
> (e) The board shall receive and review reports from the Department of Environmental Resources and shall advise the Department and the Secretary of Environmental Resources on matters of policy."

The adjudicatory function is vested in the Environmental Hearing Board by Section 1921-A of the Administrative Code, *supra*, which provides in part:

> "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,

---

2. The DER was created and given responsibilities for activities that were newly created or previously performed by the Department of Health and other departments and boards by Section 201 and Sections 1901-A through 1924-A of the Administrative Code, *supra*, and Sections 510-26, 510-101, 510-106 of Act 275, the Act of January 19, 1971, 71 P.S. 510-26, 510-101, 510-106.

1945, (P.L. 1388) known as the 'Administrative Agency Law' on any order, permit, license or decision of the Department of Environmental Resources."

Notwithstanding the above quoted statutes, appellant argues that the EQB and this Board are not separate and independent from the DER but rather "exist and act under the umbrella of the DER". In support of its argument it contends:

1. The Secretary of the DER is, by statutory appointment, the Chairman of the EQB.

2. The EQB and the board are departmental administrative boards rather than independent administrative boards.

3. The rules and regulations adopted by the EQB become the rules and regulations of the DER.

4. The EQB established the rules of procedure for the board.

5. The EQB has no technical staff and is dependent upon the DER for technical guidance.

All of these assertions are true but none show that the EQB is not independent from the DER. It is true that the EQB is by virtue of Section 202 of the Administrative Code, *supra*, a "departmental administrative board" rather than an "independent administrative board". Sections 201 and 202 of the Administrative Code, *supra*. Nevertheless, the EQB is required by Section 503 of the Administrative Code, *supra*, to act independent of the DER. Section 503 reads:

> "*Except as otherwise provided in this act, departmental administrative bodies, boards, and commissions, within the several administrative departments, shall exercise their powers and perform their duties independently of the heads or any other officers of the respective administrative departments with which they are connected*, but, in all matters involving the expenditure of money, all such departmental administrative boards and commissions shall be subject and responsible to the departments with which they are respectively connected. Such departments shall, in all cases, have the right to make such examinations of the books, records, and accounts of their

> respective departmental administrative boards and commissions, as may be necessary to enable them to pass upon the necessity and propriety of any expenditure or proposed expenditure." (emphasis added)

In *Scott Paper Company* we responded to the contention that the EQB is not independent of the DER because of the terms of Section 202 of the Administrative Code, *supra*, by stating:

> "We believe, however, that the significance of [Section 202] is to make the EQB and the EHB a part of DER for the purpose of administration and budgetary appropriations by the General Assembly. It cannot be construed to mean the EHB has jurisdiction to review the promulgation of regulations by the EQB when that would be inconsistent with the substantive administrative law of Pennsylvania." Id. at p. 5

Section 471 of the Administrative Code, *supra*, (71 P.S. 180-1) assures that many different interests are represented in the rulemaking process. It provides that the membership of the EQB include the secretaries of seven of the state's executive departments, members of the Citizens Advisory Council and members of the General Assembly.[3] The fact that the Secretary of the DER is Chairman c

---

3. Section 471 of the Administrative Code, reads:

> "The Environmental Quality Board shall consist of the Secretary of Environmental Resources, who shall be chairman thereof, the Secretary of Health, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Agriculture, the Secretary of Labor and Industry, the Secretary of Community Affairs, the Executive Director of the Fish Commission, the Executive Director of the Game Commission, the Chairman of the Public Utilities Commission, the Executive Director of the State Planning Board, the Executive Director of the Pennsylvania Historical and Museum Commission, five members of the Citizens Advisory Council and four members of the General Assembly. The Citizens Advisory Council members shall be designated by, and serve at the pleasure of, the Citizens Advisory Council. One of the General Assembly members shall be designated by, and serve at the pleasure of, the President Pro Tempore of the Senate, one by the Minority Leader of the Senate, one by the Speaker of the House of Representatives and one by the Minority Leader of the House of Representatives.
>
> Eight members of the board shall constitute a quorum."

the EQB does not detract from this purpose. Appellant's contention that the EQB is dependent upon the DER for technical guidance is partially correct. The DER will submit to the EQB technical support to justify its position on proposed rulemaking; however, there is no limitation upon the EQB which prohibits it from seeking guidance from other interests. In fact, the EQB holds public hearings during the rulemaking process and has the power of subpoena. See Section 1920-A(d) of the Administrative Code, *supra*. It may be that the makeup of the EQB and its relationship with the DER cause the EQB to be sympathetic and receptive to DER's proposals; nevertheless, it, not the DER, has the responsibility for rulemaking.

The regulations adopted by the EQB for the DER are deemed to be the rules of the DER, and the rules of procedure adopted by the EQB for the board are deemed to be rules of the board, however, that does not negate the fact that their promulgation is an action of the EQB, not the DER or the board.

II

Even if the regulations were issued by the DER we would not have jurisdiction to review their issuance. Pennsylvania law does not provide for a right of appeal of the promulgation of a regulation.

Administrative agencies typically are empowered with the functions of: (1) rulemaking, that is, generally speaking, the power to make rules having the effect of laws; and (2) adjudicatory, the power to hear and adjudicate particular controversies. The procedure used to consider private interests differ depending on which function is exercised. The focus of the statute governing rulemaking, the Commonwealth Documents Law, the Act of July 31, 1968, No. 240, 45 P.S. 1101 *et seq.*, is to create greater access to, and opportunity for, public

participation during the decision-making process.[4] But, as is the case with the enactment of laws by the legislature, there is no provision under Pennsylvania law for the appeal of rules upon their enactment. In contrast, an agency's adjudicatory actions are immediately appealable under the provisions of the Administrative Agency Law, the Act of June 4, 1945, P.L. 1388, *as amended*, 71 P.S. 1710.1 *et seq.* and Section 1921-A of the Administrative Code, *supra*.

The leading court decision in this area is the Commonwealth Court's decision in *Insurance Company of North America (INA) v. Commonwealth Insurance Department*, 15 Pa. Commonwealth Court 462, 327 A.2d 411 (1974) which we quoted extensively in *Scott Paper Company, supra*. In the *INA* case the Insurance Company appellant appealed to Commonwealth Court the promulgation of two specific regulations by the Pennsylvania Department of Insurance. The Commonwealth Court dismissed the appeal on the grounds that the promulgation of regulations is not an appealable action. The court held that only adjudications of the Insurance Department are subject to appeal under the Administrative Agency Law, *supra* and that the issuance of a regulation is not an adjudication. Appellant propounds two reasons why *Insurance Company of North America* is not precedent here: (1) the Administrative Agency Law has since been amended to delete the definition of "regulation"; and (2) the organizational character of the Insurance Commission differs from the DER in that the Commission does not have within it an internal counterpart to the EQB which could review and adjudicate a challenged regulation.

---

4. Section 1201 of the Commonwealth Documents Law, *supra*, requires public notice of proposed rulemaking and Section 1202 of the Commonwealth Documents Law requires the consideration of public comments on the rulemaking.

The definition of "regulation" was omitted when the Administrative Agency Law, *supra* was codified in Pennsylvania Consolidated Statutes Annotation. See 2 Pa. C.S.A. §101. The deletion was probably made because the Administrative Agency Law is no longer applicable to the promulgation of regulations. Section 103(a) of the Administrative Agency Law states:

> "Whenever any statute makes reference to the Administrative Agency Law for procedures relating to the promulgation of administrative regulations, such reference shall hereafter be deemed to be a reference to the act of July 31, 1968 (P.L. 769, No. 240), known as the 'Commonwealth Documents Law'."

In any event, the deletion of "regulation" from the definitional section of the Administrative Agency Law was certainly not intended to remove the distinction between adjudication and regulation.

We agree that there is a difference in the organizational structure of the DER and the Insurance Department. See part I of this adjudication. However organizational structure had no affect on the court's decision in *Insurance Company of North America*. The decision was based strictly on the statutory interpretation of the Administrative Agency Law, *supra*.

III

Appellant also asserts in its brief that "due process" requires that this appeal be heard. Yet, it cites no authority, either statutory or case law to support its contention and we are not able to find any support for the proposition that there is a constitutional requirement that the issuance of rules and regulations is an appealable action.

In reality, the review of EQB rulemaking by this board would necessarily result in rulemaking by trial. Administrative rulemaking like legislative statute

making is particularly not susceptable to either formation or review by trial type proceedings. A trial is preeminently a method for resolving controverted issues of fact whereas rulemaking, besides allowing the agency to educate itself, must consider the interests of many different factions and policy issues which may not be subject to evidential proof or disproof.

Therefore, since we find that this board has no jurisdiction to review an action of the EQB and since we find that under Pennsylvania law the issuance of a rule or regulation by an administrative agency is not an appealable event, we dismiss USSC's appeal.

O R D E R

AND NOW, this 23rd day of May, 1980, the appeal of United States Steel Corporation is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

BY: THOMAS M. BURKE
Member

DATED: May 23, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

In The Matter Of:	
BOROUGH OF MERCER AND MERCER BOROUGH SEWAGE TREATMENT AUTHORITY,	
Appellant	Docket No. 79-070-S
v.	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	The Clean Streams Law
Appellee	Sewer Connection Ban Modification
and	
COUNTY OF MERCER,	
Intervener	

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

By the Board, June 6, 1980

This matter is before the Board on an appeal filed by the Borough of Mercer (Borough) and by the Mercer Borough Sewage Treatment Authority (Authority) from an Order issued to those entities by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) on May 14, 1979.

DER, the agency of the Commonwealth, which has the power and duty to administer and enforce the "Clean Streams Law,"

Act of June 22, 1937, P.L. 1987, as amended, 35P.S. §691.1, et. seq and the rules and regulations adopted pursuant thereto, made the following findings of fact in said Order:

1. The Borough owns and operates a sewage collection system and sewage treatment plant the construction and operation of which is authorized by a permit issued by DER.
2. The Authority is the authorized agent of the Borough for purposes of administering and acquiring projects related to wastewater problems.
3. On July 20, 1972, DER ordered the Borough to prohibit sewage connections or tap-ons to its sewage collection system.
4. On March 1, 1973, this order was modified to exclude a certain area of the Borough from this prohibition.
5. The Borough and the Authority are engaged in a program of reducing the flows in its sewage collection system to its sewage treatment plant in order to relieve the hydraulic overload condition (which necessitated said sewer connection ban order).
6. That DER is authorized to impose sewer connection bans by the language contained in Section 94.21, Title 25, Rules and Regulations, Department of Environmental Resources, 25 Pa. Code §94.21.

7. That in Section 94.41, supra, 25 Pa. Code § 94.21, it is provided that under certain circumstances a sewer connection ban may be modified to allow for the connection of facilities of public need to said sewer collection system.

8. That the County of Mercer (County) requested that DER modify said sewer connection ban order to allow for the connection of a 4-unit addition to the County Juvenile Detention Home.

9. That such addition to the Juvenile Detention Home is a facility of public need.

In the text of the Order DER determined, based upon the above findings of fact, that the Borough was not prohibited from allowing or permitting the sewage connection or tap-on of said 4-unit addition to said Juvenile Detention Home. DER also determined that all other provisions of the sewer connection ban of July 20, 1972, as modified by the order of March 1, 1973, were to remain in full force and effect.

On May 14, 1979, a notice of appeal of this Order, filed by the Borough and the Authority, was received by this Board. In this notice of appeal, the Borough and the Authority contended, essentially that: 1. This Order was unconstitutional because it was not a proper action for DER to permit a modification of said sewer connection ban for the connection of said Juvenile Detention Home addition to said sewage collection system in the face of the continued refusal of DER to permit the Borough and Authority to offer connections to other applicants who

or which would be revenue producing. 2. That the public needs of the Borough for the increased revenue which would be generated if other connections would be authorized outweigh any public need for the connection of the addition to said Juevenile Detention Home. 3. There was no affirmative determination that public health hazards and/or pollution would be eliminated if this addition is connected to said sewage collection system.

On July 20, 1979, we entered an Order in which we permitted the County to intervene in this appeal.

On July 30, 1979, DER's motion to dismiss this appeal was received by this Board. In this motion to dismiss, DER averred that since DER did not make it mandatory upon the Borough to allow the connection of this addition to said sewage collection system, but rather provided that the Borough was not prohibited from so doing, neither the Borough nor the Authority were aggrieved by said Order of May 14, 1979.

On September 13, 1979, we filed an Opinion and Order in which we refused to dismiss this appeal. In issuing this denial, we took the position that when DER found, (1) that The Borough and the Authority are engaged on a program of reducing the flows in said sewage collection system in order to relieve the hydraulic overload condition in said sewage treatment plant; and (2) that the proposed addition to said Juvenile Detention Home is a facility of public need, those findings, taken together, constituted a final, appealable determination that there was no environmental or regulatory impediment to the connection of this proposed addition.

A hearing on the merits of this Appeal was held on September 20, 1979, in Pittsburgh, Pennsylvania.

FINDINGS OF FACT

1. The Borough owns and operates a sewage treatment plant, which is situate in the Borough, and which was constructed pursuant to a permit issued by DER.

2. The Borough owns a sewage collection system through which sewage generated in homes and other establishments flows to said sewage treatment plant.

3. The County owns a sewage collection line through which sewage generated in several County facilities and in five homes not owned by the County flows to said sewage treatment plant.

4. The County-owned facilities the sewage from which is discharged to the County sewage collection line are the Vo-Tech School, the Juvenile Detention Home and the County Home and Hospital.

5. The County sewage collection line, in its entirety, is ~~more than six~~ thousand feet in length.

6. The Borough sewage treatment plant is designed and permitted for treatment of an average daily flow of 400,000 gallons.

7. On July 20, 1972, DER issued an order to the Borough under the terms of which sewer connections or tap-ons into the entire sewage collection system were prohibited.

8. This order was issued because DER determined that the average daily flow entering said sewage treatment plant exceeded the design capacity of said plant, to-wit, 400,000 gallons per day. This condition is called "hydraulic overload."

9. On March 1, 1973, DER and the Borough entered into a partial consent decree, under the terms of which the July 20, 1972, sewer connection ban order was modified to exclude the Northwest Quadrant of the Borough from the prohibition

10. One of the major reasons why this sewage treatment plant became hydraulically overloaded is that groundwater entered the sewage collection system through collector sewers, interceptor sewers or building sewers by reason of defects in the pipes themselves, or in the pipe joints. This entry of groundwater is called "infiltration."

11. Another factor which produced this hydraulic overload condition was the inflows from rain events, to-wit, water reaching the sewage collection system from downspouts, storm drains, catch basins or holes in manhole lids.

12. Since the time when this sewer connection ban was imposed, the Borough has attempted to remedy this hydraulic overload condition at its sewage treatment plant. In 1972, the Borough reconstructed 1.35 miles of sewer line within its corporate limits. In 1973, the Borough did various work, including the replacement of 1,200 feet of sewer line. In 1974, there were drains disconnected, 600 feet of sewer replacement, over 2,00 feet of new sewers constructed and 10 sanitary manholes installed. In 1975, there was continued testing to determine the presence of unauthorized connetions to the sewage collection system. In 1976, 29 manholes were raised or repaired. In 1977, 476 feet of new sewer line was installed and

12 new manholes were installed. In 1978, the program of continued testing to determine the presence of unauthorized connections to the sewage collection system was continued, several sewer inspectors were hired, over 2,100 lineal feet of sewer line was purchased and additional manholes were ordered. In 1979, this 2,100 lineal feet of sewer line was installed.

13. The total cost of these attempts to remedy the hydraulic overload condition at said sewage treatment plant is approximately $435,000.00.

14. In each year from 1973 to and including 1976, there was a reduction in the average daily flow entering said sewage treatment plant; however, no records were kept during a period as to the quantity of liquid which the plant operators permitted to by-pass the plant, by utilization of a by-pass mechanism.

15. Even with this reduction in average daily flow entering said sewage treatment plant between 1973 and 1976, this plant continued to be hydraulically overloaded during those years. Furthermore, this plant was not providing that degree of treatment necessary to achieve that degree of biochemical oxygen demand (BOD) removal which was required under the terms of the permit under which it was supposed to be operated during said period.

16. In 1978, the last full year before the date of this hearing for which records of average daily flow entering said sewage treatment plant were available, the average daily

flow to said plant (not including liquid by-passed about which no records were kept until May, 1979) was 498,778 gallons. This figure is 47,000 gallons per day in excess of the 1976 average daily flow and is 98,778 gallons per day in excess of permitted capacity.

17. DER, by a Planning Engineer in its Bureau of Water Quality Management Regional Office in Meadville, advised the Authority by letter dated March 30, 1979, that said sewage treatment plant was still hydraulically overloaded, that a plan setting forth the actions to be taken to reduce the overload had to be submitted to DER within ninety days and that even the Northwest Quadrant of the Borough was now included within the prohibition of the existing sewer connection ban.

18. The County Juvenile Detention Home is situate in Coolspring Township approximately one mile northwest of the Borough. It was completed in February, 1973.

19. This Juvenile Detention Home is used as a facility for detaining youths under the age of eighteen who have committed crimes and who require security attention, pending a hearing and disposition

20. This Juvenile Detention Home was designed as a multi-county detention facility. Youths from Mercer, Butler, Clarion, Crawford, Forest, Venengo and Warren Counties have been detained there.

21. This Juvenile Detention Home was originally designed to house twelve youths at any given time, and to accommodate two resident managers, one cook, one night care worker, two supervisors, four part-time child care workers, and one teacher.

22. In the Act of April 28, 1978, P.L. 202, Sections 23 and 25, 62 P.S.§§ 2075 and 2076, it is provided, in essence, that from and after December 31, 1979, no juvenile shall be detained in a county jail.

23. By reason of the enactment of this legislation, the County determined that it was necessary to build an addition to this Juvenile Detention Home to accommodate those youths who, because of the serious nature of the crimes which they committed or because of the serious security risks which they created, were jailed rather than placed in the Juvenile Detention Home in the first place.

24. In this addition, there will be facilities to house four additional youths and one part-time staff worker.

25. At full population in the Juvenile Detention Home as it previously existed, the calculated daily sewage produced was projected to be 43,575 gallons per month.

26. At full population in the Juvenile Detention Home, with this addition, the calculated daily sewage produced is projected to be 54,300 gallons per month.

27. The actual daily sewage produced at this Juvenile Detention Home, per 1978 figures produced by the County,

averages 49,000 gallons per month, although this higher production can be explained, in part, by the fact that there is a malfunctioning water softening system at this Juvenile Detention Home.

28. Between July 30, 1979, and August 3, 1979, 917 feet of the County sewage collection line was internally inspected by means of closed circuit television camera and by means of air testing the pipe joints for defects.

29. Although it was not necessary to replace any portions of the County sewage collection line, some of the pipe joints failed and were sealed with grout.

30. According to figures submitted to DER by the Borough, the average daily flow entering said sewage treatment plant in August, 1979, was 375,000 gallons. This flow is 25,000 gallons per day less than design and permitted daily capacity.

31. According to figures submitted to DER by the Borough, the average daily flow entering said sewage treatment plant in July, 1979, was 449,000 gallons. This flow is 49,000 gallons more than designed and permitted capacity but it is 43,000 gallons less than the average daily flow which entered said sewage treatment plant in July, 1978.

32. It cannot be stated, upon the basis of the records of average daily flow entering said sewage treatment in July and August, 1979, that the reduction of the hydraulic overload condition in said plant as evidenced by what occurred in those two months will be a continuing event.

33. Although there are continued instances in which the operators of this sewage treatment plant permit sewage to by-pass the plant, all such sewage is disinfected by the process of chlorination.

34. At the time when this hearing was held, there was no evidence presented to show that there were problems at this sewage treatment plant other than a hydraulic overload condition.

35. At the time when this hearing was held, the County had arranged to have portions of its sewage collection lines north of the 917 feet of line which was inspected and tested between July 30, 1979 and August 3, 1979, tested and inspected. This area was chosen because the County suspects that there are numerous unauthorized connections in that area.

36. Downstream uses of Neshannock Creek, which is, apparently, the water of the Commonwealth to which the effluent from the Borough sewage treatment plant is discharged, will not be adversely affected by the additional influent which will be created by the addition to the Juvenile Detention Home.

37. It appears that the public health will not be endangered by the additional influent which will be created by the addition to the Juvenile Detention Home.

D I S C U S S I O N

DER issued an order to the Borough on July 20, 1972, in which a sewer connection "ban"[1] was imposed by reason of the fact that the Borough sewage treatment plant was "hydraulically overloaded."[2]

On March 1, 1973, following an appeal to this Board by the Borough from said order of July 20, 1972, DER and the Borough enter into a consent decree, under the terms which, inter alia, said ban was modified to exclude the Northwest Quadrant of the Borough from the prohibition thereof.

---

[1] A "ban" is defined in the Rules and Regulations, Department of Environmental Resources, Chapter 94, Section 94.1, 25 Pa. Code § 94.1, as follows:

> "Ban- A prohibition of additional connections to a sanitary sewer system or any portion thereof and such other necessary measures as the Department may require to prevent or alleviate an actual organic or hydraulic overload or an increase in an organic or hydraulic overload."

[2] An "hydraulic overload" is defined in said Rules and Regulations, supra. Chapter 94, Section 94.1 25 Pa. Code § 94.1 as follows:

> "Hydraulic overload-The condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based or when the flow in any portion of the system exceeds its hydraulic carrying capacity during a recent 3-month period."

On March 30, 1979, DER notified the Borough that the Northwest Quadrant of the Borough was again included within the prohibition of the ban.

On May 14, 1979, DER issued an order to the Borough and to the Authority that the Borough was not prohibited from permitting the sewage collection system through which sewage is transmitted to said sewage treatment plant.

In this Order, DER provided that it was permitting this modification to the existing ban pursuant to the authority contained in Chapter 94, Section 94.41 of its Rules and Regulations, 25 Pa. Code § 94.41. In this Section, it is provided as follows:

"§ 94.41 Elimination or reduction of overload.

A ban may be modified or removed by the Department, in the exercise of its discretion, in accordance with the following conditions:

(1) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the actual loading to less than the capacity provided in the permit, the ban may be modified or removed to allow connections up to the permitted capacity.

(2) If it is affirmatively demonstrated, through the submission by the permittee and approval by the Department of an application for an amendment to the permit, that both, the actual capacity of the plant or the sanitary sewer system or any part thereof, or both, is in excess of the capacity provided in the permit and is sufficient to prevent an overload until additional capacity is made available, the ban may be modified or removed to allow connections up to the new capacity.

(3) If the permittee has demonstrated that steps have been taken which have resulted in the reduction of the overload and that public health will not be endangered and that downstream uses will not be adversely affected, the ban may be modified to allow for limited approval of connections for the elimination of public health hazards, the elimination of pollution, or the connection of facilities of public need, provided that the program for the reduction of the overload continues in a manner which will result in the overall reduction of overload."

It appears that this Section is designed to enable DER to act upon a request by a permittee for relief from a ban when the permittee is able to demonstrate that it has taken positive action with regard to the condition which made the imposition of the ban necessary in the first instance.

In this matter, we are faced with the rather unique circumstances that the permittee opposes the modification of the ban which is made possible by this Order and that the permittee has made every effort to convince us that it has not satisfied any of the criteria for the granting of such a modification which are set forth in Section 94.41, supra.

If we take the narrow view that under all circumstances it is only at the specific request of a permittee that DER can consider whether a ban can be modified or removed, there could be a situation where a permittee, for no legitimate reason, could retard development by refusing to request a ban modification even if the conditions for such modification are clearly present.

We choose, instead, to take the view that DER may independently review information which it receives, be it from a permittee, from an entity which is constrained by the ban or from its own information, to determine whether relief can be granted pursuant to Section 94.41. We are convinced that it was the intent of the Environmental Quality Board, when it adopted Section 94.41, that if DER was satisfied that a ban should be modified, by proof that any one of the three conditions set forth in Section 94.41 were and would be met, such proof could be received from any competent and interested source.

DER and the County contend that Section 94.41 (3) is applicable to this matter and that the conditions for a ban modification which are set forth therein have been established in this matter. They are, once again, as follows:

1. There must be a demonstration that steps have been taken which have resulted in the reduction of the overload.

2. There must be a demonstration that public health will not be endangered.

3. There must be a demonstration that downstream uses will not be adversely affected.

4. There must be a program for the reduction of the overload which continues in a manner which will result in the overall reduction of the overload.

In addition, as this Section applies to the instant matter, it must be demonstrated that the addition to the County Juvenile Detention Home is a facility of public need.

We have found that the Borough has spent approximately $435,000.00 between 1972 and mid-1979 on various measures to reduce the hydraulic overload condition in its plant. This effort has been directed towards eliminating infiltration and towards detecting unauthorized connections to the Borough sewage collection system. Although there was a reduction in the average daily flow entering the sewage treatment plant between 1973 and 1976, in 1978, the last full year before the date of the hearing in this matter, the average daily flow entering the sewage treatment plant was 47,000 gallons per day in excess of design and permitted capacity. Unfortunately, the effort by the Borough was deemed

to be so unsuccessful that DER was required, on March 20, 1979, less than two months before this ban modification Order was entered, to re-include the Northwest Quadrant of the Borough within the prohibition of the ban and pursuant to Chapter 94, Section 94.21 (a) (3), of its Rules and Regulations, 25 Pa. Code § 94.21 (a) (3), to direct the Borough to submit a plan setting forth the actions to be taken to reduce the overload to DER within ninety days.

We have found that the County owns a sewage collection line which is more than six thousand feet in length. Sewage generated in the County Juvenile Detention Home, the County Home and Hospital, the County Vo-Tech School, and in five homes flows through this line to the Borough sewage treatment plant. It can reasonably be assumed that this line has contributed to the hydraulically overloaded condition of this plant by reason, inter alia, of infiltration into that line.

There was no evidence that at any time prior to July 30, 1979, the County made any effort to determine the condition of that line. It is clear that the Borough did not direct any of its abatement efforts toward this line because the Borough believed that it did not have the right to do so.

We heard evidence that between July 30, 1979, and August 3, 1979, 917 feet of the County line was inspected. We learned that as the result of this inspection, defects in some of the pipe joints were observed and corrected. It may very well be that as the result of this corrective work, some infiltration

into the County line has been abated. This is a possibility because in the month of August, 1979, the average daily flow entering said sewage treatment plant from all sources was 25,000 gallons less than the design and permitted capacity of the plant and in the month of July, 1979, the average daily flow entering said plant from all sources was in excess of design and permitted capacity, but less than the average daily flow which entered said plant in July, 1978.

However, we cannot hold, on the basis of the fact that there has been a reduction in the overload in this plant during these two dry weather months, that it has been demonstrated that steps have been taken which have resulted in the reduction of the overload on an on-going basis. If, however, the records for the months, in 1979 subsequent to August and in the first several months in 1980, indicate that the overload to this plant has been reduced, we can and would hold that this requisite for ban modification under Section 94.41 (3) has been established.

We next direct our attention to the requirement that there must be in effect a continuing, effective program which will result in the overall reduction of this overload.

It is clear that as late as March 30, 1979, DER demanded that the Borough submit a plan by which such a program would be implemented. Although it appears that the Borough did submit some document in response to this demand, there is no evidence in the record from which we can conclude that such document was accepted by DER as constituting an effective overload reduction program.

We heard evidence that the County intended to inspect other portions of its sewage collection line in an area where it was suspected that numerous unauthorized connections thereto were in existence. Obviously, there is no evidence that this inspection was performed or that problems were found or that corrections were made.

Perhaps, in the months between the date of the hearing and the date of this Adjudication, there has been a continuing and effective program which has resulted or will result in the overall reduction of this overload. At this posture, however, we have no basis upon which to conclude that such a program exists. As such, we hold that this second element necessary for ban modification under Section 94.41 (3) has not been established.

The next two requirements for ban modification under Section 94.41 (3) are that such a modification as is here proposed will not endanger the public health and such a modification as is here proposed will not adversely affect uses downstream from the point in the waters of the Commonwealth at which sewage effluent from this collection and treatment system is discharged.

There is no evidence in this matter that there are problems at this treatment plant other than a hydraulic overload condition. For example, the evidence tends to show that the plant is causing effective removal of organic compounds contained in the sewage which flows thereto.

It is true that there are continuing instances in which sewage in the sewage collection lines leading to said plant is by-passed. However, the most obvious danger to the public health which could

result from such a by-pass, the presence of bacterial organisms, is obviated by reason of the fact that even by-passed sewage is disinfected by the process of chlorination.

We are not willing to disturb the conclusion of DER that the public health will not be endangered by reason of the sewage which would be added to this sewage collection system if the addition to the Juvenile Detention Home is connected thereto. We will, however, be a great deal more satisfied with the state of affairs in this matter if it is possible to eliminate by-passes of sewage.

We conclude that DER has satisfactorily established that there are no downstream uses which will be adversely affected by the sewage which would be added to this sewage collection system if the addition to the Juvenile Detention Home is connected thereto. We received evidence that the nearest public water intake point is many miles from the receiving waters and it was not shown that there were any other downstream uses which could be adversely affected by this additional flow.

The one thing which is quite clear in this matter is that the County Juvenile Detention Home is a facility of public need which must be enlarged. This is for the reason that the Legislature has declared, in the Act of April 28, 1978, supra, 62 P.S. §§ 2075 and 2076, in essence, that no juvenile should be detained in a county jail. The public has a definite need for a facility which is large enough so that certain juveniles who have committed serious crimes and/or who are security risks can be detained in a place where the public need not be concerned about

its security and in a place where the juvenile can be detained without the hostile and demoralizing environment which is present in a jail.

It is because there exists this public need for an enlarged Juvenile Detention Facility in the County that we are going to remand this matter to DER, rather than to sustain the appeal of the Borough and the Authority.

We remand because it is clear to this Board that there now must be in existence sufficient data which can be analyzed to determine whether steps have indeed been taken which have resulted in the reduction of the overload condition at this plant on an on-going basis. Furthermore, DER should now be in a position that it has evaluated the overload reduction plan submitted by the Borough. Finally, unless the County was less than candid about carrying through its plan to inspect and, possibly, correct additional portions of its sewage collection line, DER should now have information about the effect of such a program on the hydraulic overload condition at this plant.

CONCLUSIONS OF LAW

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

2. DER may modify a sewer connection ban, pursuant to Chapter 94, Section 94.41 of its Rules and Regulations, 25 Pa. Code §94.41, without the necessity of a request for such modification made by the permittee against which such ban was directed.

3. A sewer connection ban modification cannot be granted where the conditions under which it may be granted, set forth in Section 94.41, supra, have not been established.

4. The Mercer County Juvenile Detention Home is a facility of public need.

O R D E R

AND NOW, this 6th day of June, 1980, it is hereby Ordered that this matter is remanded to DER for a determination as to whether there is now additional information and data with regard to steps which have been taken which have resulted in the reduction of the hydraulic overload at the Borough sewage treatment plant and as to whether there is now in existence a program for the continued reduction of the hydraulic overload at said sewage treatment plant.

It is further Ordered, given the fact that there is an urgent need for the 4-unit addition to the County Juvenile Detention Home, that this Board shall receive this additional information and data at a hearing to be held not later than twenty days from the date of this order.

It is further Ordered that this additional information and data is needed in order for this Board to determine whether, under and by virtue of the provisions contained in Chapter 94, Section 94.41 (3) of the Rules and Regulations of DER, 25 Pa. Code § 94.41.(3), the existing sewer connection ban in the Borough may be modified to permit the connection of said addition to said Juvenile Detention Home to the sewage collection system which conveys sewage to the Borough sewage treatment plant.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS, Chairman

Thomas M Burke

THOMAS M. BURKE, Member

DATED: June 6, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BUTLER COUNTY MUSHROOM FARM, INC. and ROY LUCAS, SUPERVISOR : Docket No. 78-132-B

: General Safety Law

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By Thomas M. Burke, Member, June 23, 1980

This matter comes before the Board on appeals by Butler County Mushroom Farm, Inc. (BCMF) and Roy Lucas, Supervisor for BCMF, from an order issued by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER). BCMF owns and operates two mushroom facilities in worked-out, underground limestone mines in West Winfield, Butler County and Worthington, Armstrong County. The DER order requires appellants to implement a "check system" at both underground facilities which will identify every person underground at any time and make the information available at the surface near the entrance of each mine. The order made findings that a check system is necessary to protect the health and safety of people entering underground.

Appellants filed appeals from the order on October 20, 1978, alleging principally that the DER lacked authority to issue the orders. Coincident with

filing the appeals, appellants filed a petition for supersedeas on the grounds that they would be irreparably harmed if the order remained in effect during the period pending its review and that they were likely to prevail on the merits of their appeals.

Hearings were held on appellants' petition for supersedeas on October 31 and November 3, 1978. On November 14, 1978 the Board issued an Opinion and Order denying appellants' petition for supersedeas for reason that appellants did not show they would suffer irreparable harm or would ultimately prevail on the merits.

On November 30, 1978 the Board denied appellants' motion for an amended order to allow an interlocutory appeal from the Board's Opinion and Order denying the petition for supersedeas. Thereafter, on December 11, 1978, the DER approved a check system submitted pursuant to the order without prejudice to appellants' appeal. Appellants filed a timely precautionary appeal from the DER's approval of their plan at EHB Docket No. 79-005-B, which, upon joint motion, was consolidated at the above-captioned docket number by order dated March 9, 1979.

Subsequently, the parties agreed by stipulation that the record made at the supersedeas hearings would be the record before this Board on the merits of the appeals. The appellants and the DER have filed briefs containing proposed findings of fact and conclusions of law. Based on the aforesaid we enter the following:

FINDINGS OF FACT

1. Appellant is Butler County Mushroom Farm (BCMF), a corporation with an address at P. O. Box N, Worthington, Pennsylvania.

2. Appellant is Roy Lucas, a maintenance supervisor at BCMF's facilities in Worthington, Armstrong County and West Winfield, Butler County, Pennsylvania.

3. Appellee is the DER, the agency entrusted with the duty to enforce the provisions of the General Safety Act, the Act of May 18, 1937, P.L. 654, 43 P.S. 25.1 *et seq.* as it applies to the operations set forth in Section 2(f) of the General Safety Act.

4. BCMF owns and operates mushroom farms in two mined-out, limestone mines; one at Worthington, Amstrong County, and the other at West Winfield, Butler County, Pennsylvania.

5. BCMF employs approximately 950 production and maintenance workers at the facilities, approximately 50% of whom work underground at any given time.

6. The facilities at each location include above-ground operations such as laboratories, storage and processing facilities.

7. No limestone mining or extraction has been performed at either underground facility since prior to their acquisition by BCMF.

8. Each underground facility consists of both developed and undeveloped areas. The mushroom production operations, i.e. picking and growing operations, are performed exclusively within the developed areas. The undeveloped areas are used to provide proper air circulation and temperature for mushroom growing.

9. The work necessary to create a developed area consists of roof support, scaling operations and floor preparation. Both the roofing and scaling operations require the work of an experienced miner, have the effect of enlarging the underground cavity and necessitate the removal of limestone.

10. Preparation of mined-out areas for use as undeveloped areas require roof and rib (side) support. Safety posts are installed for initial support. Roof bolts are then installed for additional support. If additional permanent support is deemed appropriate, concrete blockwalls and steel support

beams or columns may be installed. The roof and ribs are scaled with bars to remove any loose material. The joint area between the roof and rib is gunited with concrete when necessary to eliminate excessive moisture.

11. The West Winfield facility is fully developed. At least one year of development work is scheduled for the Worthington facility.

12. The mushrooms are grown in flat wooden trays containing composted material, mushroom spawn and casing soil. The growing trays are placed in individual caverns in the developed areas and periodically are watered and inspected. After a period of a few weeks, the mushrooms grow to maturity.

13. BCMF's maintenance crew consists of ten (10) full-time employees, one (1) supervisor, and four (4) extras who fill in for absent full-time employees. It performs maintenance work and development work at both mines.

14. Approximately two-thirds of each underground facility is maintained as an undeveloped area.

15. The physical construction of the underground facility is basically the same as that of mined-out areas used for underground storage in the Commonwealth.

16. BCMF operates gasoline-powered vehicles at both underground facilities pursuant to a variance issued by the Commonwealth of Pennsylvania, Bureau of Labor and Industry.

17. BCMF generally operates a safe operation and has been cooperative with the DER in the past. The DER has never shut down any part of BCMF's facilities because of an imminent hazard.

18. The potential for fire at appellants' underground facilities is no greater than the potential for fire hazards due to the presence of gasoline and electricity at all underground facilities.

19. Fire presents a danger to persons underground because it generates smoke and carbon monoxide into a confined area.

20. John Conroy is an inspector for the DER Office of Deep Mine Safety in the western part of Pennsylvania. Mr. Conroy inspects 20 underground facilitie all of which have a check system except the BCMF facilities at Worthington and West Winfield. Included within the 18 facilities having check systems are five (5) mined-out areas used for underground storage.

21. Any person who is underground or enters underground during a fire is in serious jeopardy from fumes, as well as the hazards of fire generated roof-falls.

22. The check system required by the DER order must identify every person who is underground at any time in the Worthington and West Winfield mines and make the information available at the surface near the entrance to the mines.

23. BCMF's hourly employee time clock can satisfactorily serve as a check system for its hourly employees.

24. BCMF does not have a check system for those persons who enter the mine without punching a time clock. Those persons who do not use the time clock include supervisors, independent contractors, food service employees, telephone repairmen and visiting members of the public, including touring high school students.

25. There is no method presently in existence for determining the number of, or the identity of, persons underground in either mine at any given time.

26. A check system which does not account for everyone underground is of little, or no use.

27. The absence of a check system jeopardizes the safety of persons who might be engaged in rescue operations.

DISCUSSION

I

Appellant, BCMF, operates mushroom growing and processing facilities in two mined-out limestone mines in western Pennsylvania. The mines were developed for mushroom growing by the construction of a floor and supports for the ceiling and sides of individual rooms or caverns sized about 20 feet wide, 120 feet long and 15 feet high. Water and electric lines and drains were also installed. The operation employs about 950 people at the two facilities, about half of whom work underground.

The mushrooms are grown in flat wooden trays about 20 feet long containing composted material and casing soil. The trays are seeded and stacked to the ceiling in the rooms and periodically watered and inspected. The mushrooms mature in a period of a few weeks. The whole tray is then taken by gasoline powered tractors to a different area for picking. After they are replenished, the trays are returned to the growing rooms and stacked by gasoline powered high lifts.

Other than BCMF's employees, those who have a reason to enter the mines include employees of outside contractors, utility repairmen, cafeteria workers and persons making deliveries. BCMF also invites groups to tour the mines.

The DER's Office of Deep Mine Safety has been attempting since 1973 to persuade BCMF to implement a check system, that is, a system which would make the names of everyone underground at any given time accessible to a person on the surface. Walter Vincinelly, the commissioner of the Office of Deep Mine Safety, issued the order. He has been a member of a deep mine rescue team for the past 16 years. During that time he directed rescue operations for three mine fires. He testified that the potential for fire exists in these mines be-

cause of the presence of gasoline and electrical equipment. He further testified that when a fire occurs the first thing to be determined is whether anyone remains underground. If people remain underground their lives may be endangered by the presence of smoke and carbon monoxide in a confined area, and a rescue team will be sent in to bring them out. The rescuers themselves become subject to the hazards of smoke, carbon monixide, bad roof and exhaustion. If no one is underground, the rescuers will not go in and the fire can be allowed to burn itself out.

Hopefully, such an accident will never occur underground; however, the implementation of a check system appears to be a reasonable and prudent way to prepare for such an eventuality, especially since there is minimal cost and effort involved. The existing time clock would suffice for those employees who use it and the others could satisfy the order by signing a register when entering and exiting the mine. Nevertheless BCMF has steadfastly refused to implement a check system. Its refusal has resulted in the DER's issuance of the subject order.

Appellants' refusal results from the belief that the DER does not have the authority to require a check system.

The DER's order states that it is issued under the authority of the Act of May 18, 1937, *as amended*, 43 P.S. 25.1 *et seq.* ("the General Safety Law");[1] 34 Pa. Code §§33.182 and 33.251; and Section 1917-A of the Administrative Code, the Act of April 9, 1929, *as amended*, 71 P.S. 510-17.

II

Appellants initially contend that the DER does not have the authority to issue the order because the General Safety Law does not expressly authorize

---

1. The DER was granted the authority to enforce the General Safety Law and the regulations promulgated under it at underground facilities by the Reorganization Plan No. 2 of 1975, 71 P.S. §756-2.

the issuance of orders and "administrative agencies must act strictly within their legislative grant of power".

The DER cites Section 13 of the General Safety Law as authority for the order. Section 13 states:

> "The provisions of this act shall be enforced by the Department of Labor and Industry. For the purpose of enforcing the provisions of this act, the Secretary of Labor and Industry, or his duly authorized representative, shall have the power to enter any room, building, or place where labor is employed, and to issue the necessary instructions to the superintendent, manager, or responsible agent of the employer, to correct violations of this act or regulations based on this act. (Emphasis added.)"

Appellants argue that the power to issue instructions given in Section 13 does not imply the power to issue administrative orders. We disagree. In the context of Section 13, "instruction" has the same meaning as "order". The purpose of Section 13 is to empower the DER with the authority to require an employer to comply with the General Safety Act and its regulations. If an employer is not required to comply with an "instruction", then Section 13 does not add to DER's powers and duties and is mere verbage. If an employer is required to comply with the Section 13 administrative action, its denotation as "order" or "instruction" is inconsequential. We believe that the legislature promulgated Section 13 for a purpose, and thus we find that employers must comply with the "orders" or "instructions" issued under it. See Section 1922 of the Statutory Construction Act, the Act of November 25, 1970, *as amended*, P.L. 707, 1 Pa. C.S.A. 1922 which imparts a presumption that the General Assembly intends the entire statute to be effective and certain.

Moreover, we are reluctant to interpret Section 13 in a manner which would deprive the DER of the adjudicatory power which is typically a function of

present day administrative agencies. In *Pennsylvania Association of Life Underwriters v. Dept. of Insurance*, 29 Pa. Commonwealth Ct. 459, 371 A.2d 564 (1977), *affd.*, 482 Pa. 330, 393 A.2d 1131 (1978) the Commonwealth Court decided that the Pennsylvania Insurance Commissioner has the implied authority to exercise a legislative function, the promulgation of regulations, because of "his statutory power and duty to enforce the Act by investigating, prosecuting and penalyzing violations thereof". The Court quoted *Uniontown Area School District v. Pa. Human Relations Commission*, 455 Pa. 52, 313 A.2d 156 (1973) for a proposition which is particularly apropos here. The Court stated that "statutory provisions evidence to us a legislative intent to empower the Commission to do a good deal more than merely interpret the Act" Id. 371 A.2d 564 at 567. For the same reasons we find that the Section 13 grants to DER the authority to issue the subject order.

III

Appellants argue, in the alternative, that assuming Section 13 authorizes the subject order, the order is nevertheless an arbitrary and capricious act because the absence of a check system does not violate either the General Safety Act or the regulations issued thereunder and Section 13 authorizes the issuance of instructions only to:

> "...correct violations of this Act or regulations based on the Act."

The DER's order asserts that the check system is required by regulation 33.251 of 34 Pa. Code. Section 33.251 provides that:

> "§33.251. Safety check on employes.
>
> * * *
>
> (b) The contractor or superintendent of each cavern shall provide a suitable method of keeping a check on the men entering and leaving the cavern. The cavern

"superintendent, or foreman shall make sure both that all employes are safely out of the cavern before blasting and at the end of each shift."

We agree with appellants that Section 33.251 does not apply to its mushroom production facilities. Section 33.251 is part of a subchapter entitled "Subchapter D. Construction of Mined Underground Storage Caverns." The scope of subchapter D is specifically limited by Section 33.182 to "rules to safeguard the lives, limbs and health of workers engaged in the construction of underground storage caverns" BCMF is continually developing mined-out areas in its West Winfield mine,[2] however that development work can hardly be construed as storage cavern construction. Moreover, even if applicable to BCMF's facilities, it would, by its terms, only cover those employees actually engaged in the development of the production areas, BCMF's 15-man maintenance crew.

Since 34 Pa. Code 33.251 only applies to employees engaged in actual construction and since a plan which includes only some of the people underground is of little value, we are convinced that 34 Pa. Code 33.251 is not intended to regulate a production operation such as appellants.

IV

The fact that a check system is not required by regulation is not determinative. The DER may by order require a check system to enforce Section 2(f) of the General Safety Act. Section 2(f) provides:

"All pits, quarries, mines other than coal mines, trenches, excavations, and similar operations shall be properly shored, braced, and otherwise guarded, operated, and conducted as to provide reasonable and adequate protection to workers employed therein."

---

2. There are no plans for further development of mined-out areas in the Worthington mine.

Appellants argue that §2(f) cannot be enforced by order because the courts have held §2 to be not self-executing. See *Matulinois v. Reading Railroad Company*, 421 Pa. 230, 219 A.2d 306, (1966) and *Hershman v. George W. Weaver and Son, Inc.*, 95 Dauph. 323 (C.P. Dauph. 1973). Both the Matulonois and Hershman courts held that §2 does not proscribe a rule of conduct on which negligence can be based. Rather, they opine, it is a vehicle through which the administrative agency may promulgate definitive rules and regulations concerning safety measures.

Appellants' argument evidences a misconception of the function of an administrative order. An order may be used to request a person to cease or desist the violation of a specific provision but, like rule-making, it is generally used to apply a general statutory provision to a specific situation, see *Commonwealth v. Derry Township*, 10 Pa. Commonwealth Ct. 619, 314 A.2d 868 (1973) and *Gabriel Elias v. Environmental Hearing Board*, 10 Pa. Commonwealth Ct. 489, 312 A.2d 486 (1973). Both administrative orders and rule-making determine prospective duties from past facts and existing laws. They differ chiefly in their application. An order, as an agency's adjudicatory function, has particular application, that is, it has application to a named person or specific situations whereas a rule or regulation has general applicability in that it applies to classes of persons or situations. Justice Murphy in *Securities and Exchange Commission v. Cheneny Corporation, et al.*, 332 U.S. 194, 67 S. Ct. 1575 (1974) explained why an adminstrative agency should be authorized to interpret and apply a general statutory standard on a case-by-case basis by order rather than having to rely on rule-making.

Justice Murphy stated:

> "Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. Some principles must await their own development, while

"others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, an administrative agency must be equipped to act either by general rule or by individual order. To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

"In other words, problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule. Or the agency may not have had sufficient experience with a particular problem to warrant rigidifying its tentative judgment into a hard and fast rule. Or the problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." Id. 67 S. Ct. at 1580

We find that the DER may enforce §2(f) by either regulation or order. If enforced by order, the DER must show that the required conduct is necessary to provide the reasonable or adequate protection to the workers required by §2(f). See *Industrial Board v. Hilti Rapid Fastening Systems, Inc.*, 29 D&C 2d 11 (Dauphin, 1961) where the Court reversed an order issued under the General Safety Act prohibiting the use of a certain tool because the Department of Labor did not show by substantial evidence that there was a danger of injury from use of the tool.

Here, the DER did not act arbitrarily or unreasonably in concluding that the protection of the workers would be best served by the implementation of a check system which would make the names of everyone underground at any time accessible to a person on the surface. We also find that the evidence supports DER's assertion that to be effective and provide protection for employees, a check system must include every person who enters the mine.

V

Finally, we disagree with appellants' assertion that the persons who work at these facilities are not included in the coverage provided by the General Safety Act because Section 1 excludes "farms" from its coverage. We doubt that BCMF's operation, which involves the growing of mushrooms in wooden trays stacked to a 15 foot high ceiling in worked-out limestone mines, can reasonably be said to comport with traditional notions of agriculture. Agriculture has traditionally been defined as the cultivation of land. See Websters' New Twentieth Century Dictionary. Nor can BCMF's employees, who work underground, work three different shifts and are represented by the United Steel Workers' Union, be characterized as farmers.

VI

The order was also issued under the provisions of Section 1917-A of the Administrative Code, the Act of December 3, 1970, P.L. 834, 71 P.S. 510-17, which empowers the DER to order the abatement of nuisances. Since we have determined that the DER is authorized to issue the order by virtue of the General Safety Act, we need not decide whether the absence of a check system constitutes a nuisance abatable by order from the DER.

CONCLUSIONS OF LAW

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

2. Section 13 of the General Safety Law, the Act of May 18, 1937, *as amended*, 43 P.S. 25.1 *et seq*. grants to DER the power to issue administrative orders to require compliance with the General Safety Law and its regulations.

3. 34 Pa. Code 33.251 regulates the construction of mined underground storage caverns; it does not apply to underground mushroom production facilities.

4. Section 2(f) of the General Safety Law, *supra*, may be enforced by the DER by administrative order.

5. The DER did not act arbitrarily or unreasonably when it determined that the protection of workers employed underground in appellants' mushroom production facilities as required by §2(f) of the General Safety Law, *supra*, would best be served by the implementation of a check system which would make the names of everyone underground at any time excessable to a person on the surface.

6. The General Safety Law, *supra*, applies to appellants' underground facilities. The facilities are not excluded from the coverage of the General Safety Law, *supra*, by the exemption for farms stated in §1 therein.

ORDER

AND NOW, this 23rd day of June, 1980, the appeals of Butler County Mushroom Farm, Inc. and Roy Lucas are dismissed.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

BY: THOMAS M. BURKE
Member

Dennis Jay Harnish

DENNIS J. HARNISH
Member

Chairman Paul E. Waters abstains.

Paul E Waters

PAUL E. WATERS
Chairman

DATED: June 23, 1980

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. 76-044-CP-W

Complaint for Civil Penalties

v.

MELE CONSTRUCTION COMPANY, INC.,
MOBIL PIPE LINE COMPANY and
LOWER LACKAWANNA VALLEY SANITARY AUTHORITY

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

By Paul E. Waters, Chairman, July 2, 1980

This matter comes before the board on Complaint for Civil Penalties following an oil pipeline break which occurred October 3, 1975, in the Lackawanna River.

Defendant, Mele Construction Company, contractor for Lower Lackawanna Valley Sanitary Authority, hereinafter Authority, was doing finishing work after installing a sewer line, when its backhoe struck defendant, Mobil Pipe Line Company's underwater pipeline causing 98,500 gallons of oil to spill before it was stopped. DER contends that all three defendants are liable for substantial penalties because of their various acts of negligence and violation of Sections 301, 307 and 401 of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.*

FINDINGS OF FACT

1. Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Resources, hereinafter DER.

2. Defendant Mele Construction Company, Inc., hereinafter Mele, is a Pennsylvania corporation whose principal place of business is located at 301 Erie Street, Dunmore, Pennsylvania 18512.

3. Defendant Mobil Pipe Line Company, is a Delaware corporation, registered to do business in Pennsylvania, whose principal office in Pennsylvania is located at 123 South Broad Street, c/o C.T. Corporation Systems, Philadelphia, Pennsylvania 19109.

4. Defendant Lower Lackawanna Valley Sanitary Authority, hereinafter Authority, is a Pennsylvania municipal authority organized and existing under the laws of Pennsylvania whose principal place of business is Coxton Road, Duryea, Pennsylvania 18642.

5. On or about October 3, 1975, a distilled petroleum product (gasoline) in the amount of approximately ninety-eight thousand five hundred (98,500) gallons was discharged into the Lackawanna River at the location of an eight (8") inch pressure gasoline pipeline crossing at Moosic Borough, Lackawanna County, Pennsylvania.

6. Gasoline is an industrial waste pursuant to Section 1 of The Clean Streams Law, 35 P.S. §691.1.

7. At the point of the discharge of the aforesaid gasoline, the Lackawanna River is a water of the Commonwealth, pursuant to Section 1 of The Clean Streams Law, 35 P.S. §691.1.

8. On or about October 3, 1975, Mele was engaged in construction activities by, for and on behalf of the Authority, at the Lackawanna River where an eight (8") inch pressure gasoline Mobil owned pipeline, crosses the Lackawanna River, in Moosic Borough, Lackawanna County.

9. In the process of its activities on the eastern shore of the Lackawanna River in the Borough of Moosic, Lackawanna County, Pennsylvania, Mele, through the actions of an employee, ruptured the aforesaid pipeline.

10. On the eastern shore of the Lackawanna River in the Borough of Moosic, a permanent marker indicates the location of the aforesaid pipeline in the vicinity.

11. In addition to the permanent marker on the easterly side of the river, there is a permanent marker on the western side of the river which is visible from the scene of the accident.

12. The existence and location of the permanent pipeline markers were known to Mele and were visible to its agents and employees on or about October 3, 1975. However, the pipeline did not run in a straight line between the markers, but makes an abrupt turn a few feet from the bank of the river on the east side of the river.

13. Several months prior to October 3, 1975, Mele installed an interceptor sewer line for the Authority by tunnelling under the pipeline.

14. The work being performed by Mele at the time of the rupture was "surface restoration" which included the dressing and grading of the riverbank.

15. During those times when Mele was engaged in the construction activity of installing an interceptor sewer under the aforesaid pipeline, Mobil maintained an agent or employee at the construction site during all work hours.

16. On or about October 3, 1975, Mobil did not have a knowledgeable agent or employee at the construction site during the surface restoration work on or about October 3, 1975, because Mobil was not notified that any work was to take place.

17. A Mele employee admitted that he had inadvertently hooked into the gas line with the bucket of the machine he was using to dress the banks.

18. Upon arrival at the scene, DER proceeded downstream for purposes of inspecting the stream for damages. During the inspection, DER first found dead fish along the banks of the river and on gravel bars in the river. Proceeding downriver, DER continued to find increasingly more fish. At one point in the river, thousands of dead and dying fish were observed.

19. Five local fire companies responded to the potential explosion and fire threat caused by the discharge of gasoline into the river and had manned seven bridges which spanned the river. The fire companies were observed to be stopping traffic approaching the bridges from both directions and instructing everyone to extinguish their cigarettes and to refrain from lighting cigarettes as they passed over the bridge.

20. The concentration of gasoline found at the last sample point of five samples, over five and one half miles downstream from the pipeline break, was 540 ppm gasoline, which is well beyond the range of 8 ppm to 240 ppm necessary to kill the type of fish found in the Lackawanna River.

21. Downstream from the Old Forge Bridge, the PA Fish Commission observed that the oil slick virtually covered the whole width of the stream, approximately 75 feet and that the air was heavy with gasoline vapor.

22. The Commission inspected the Lackawanna River on October 3 and 4 for purposes of determining the extent of the damages to the river, determined that over 13,000 fish had been killed by the discharge of gasoline. This 13,000 figure included approximately 5,000 minnows, in addition to suckers, trout, carp, pickeral and sunfish.

23. The Chief of the Aquatic Field Services Unit for DER conducted a biological investigation of the kill area for purposes of determining damage to the stream. This investigation was conducted on October 30 and 31, more

than 27 days after the incident. This investigation included electro-fishing the Lackawanna River upstream and downstream from the point of break for the purpose of counting the number of fish present, and made a much higher estimate of the number of fish killed.

24. In addition to the estimated fish kill damages, the river sustained fish food damages, damages to the bug community found in the river and the loss of use of the river as a fishery.

25. DER incurred, at minimum, itemized costs of $1,601.49 because of the incident from October 3 through November 14, 1975. Additional estimated cost incurred by the DER totalled between $1,500 and $2,000, not counting $2,674.73 which was estimated as the commercial value of the fish killed.

26. Gasoline is classified as a hazardous substance by Department of Transportation regulations because it has potential to explode.

27. The pressure in the pipe was sufficient to create a gasoline gusher which extended 50 feet into the air.

28. Mele did not have a Clean Streams Law waste discharge permit from DER for the discharge of gasoline on or about October 3, 1975.

29. During those times when Mele was engaged in the construction activity of installing an interceptor sewer under the aforesaid pipeline, Mobil maintained an agent or employee at the construction site during all working hours. On or about October 3, 1975, Mobil did not have a knowledgeable agent or employee at the construction site during the surface restoration work, because Mobil was not notified that any work was to take place.

30. The operator of the backhoe that broke the pipeline admitted to a DER employee on one occasion and to a Mobil employee on another occasion that he didn't know the pipeline was there.

31. Mobil, before leaving the site on May 21, 1975, asked Mr. Mele to contact Mobil if they were going to do any additional work in the area of the pipeline, because it is a very high pressure pipeline and very dangerous.

32. Mobil is the owner and operator of the aforesaid pipeline and was the owner and operator of said pipeline at all times relevant to this action.

33. Mobil did not have a Clean Streams Law permit from DER for the discharge of gasoline on or about October 3, 1975.

34. Mobil originally put a permanent marker at the bend of the pipeline in the river in April 1975, but this marker was not in place on the date of the rupture. This "permanent" marker may have been moved or otherwise destroyed by Hurricane Eloise which caused high water and flooding on September 30, 1975.

35. Although Mobil attempted to stake out the pipeline in May of 1975, they used wooden stakes, driven into sand which were not in place on the day of the accident.

36. On October 10, 1975, after the spill, Mobil placed a permanent marker in the river locating the bend in the pipeline.

37. Within a few hours after the rupture Mobil employees attempted to turn off the gasoline to the ruptured pipeline by turning two valves which were located at one and three miles from the rupture but gasoline continued to flow into the river for several hours after the gasoline was shut off.

38. The Mobil pipeline was between two and three feet below the bottom of the river bed.

39. The Authority was the owner of the interceptor sewer line.

40. The Authority did not have a Clean Streams Law permit from the DER for the discharge of gasoline into the Lackawanna River on or about October 3, 1975.

41. Albright and Friel, who later became Betz Environmental Engineers, hereinafter Betz, were employed by the Authority as design and supervising engineers on this project. Betz exercised total supervisory control over this project.

42. On April 7 Mobil wrote Betz stating: "Your contractor should be warned to use diligent care when excavating near our facility. We will require that he contact our area supervisor, Mr. J. F. Erbel at Rochester 716-328-8180, at least three days prior to commencing his work near our facility so that he can send a representative to the site to state the exact location of our pipeline and maintain a safety watch during construction if it is deemed necessary".

43. Betz took responsibility for notifying Mobil when Mele was going to work in the vicinity of the pipeline.

44. The pipeline was repaired and back in operation by October 4, 1975, one day after the incident.

45. The Lackawanna River completely recovered from the affects of the gasoline spill within a few months after the incident.

DISCUSSION

DER has asked that we impose civil penalties against all three defendants for their part in a Lackawanna River gasoline spill which was caused when Mele Construction ruptured a pipeline owned by Mobil while doing work for Lower Lackawanna Sanitary Authority.

There can be no doubt this was a major gasoline spill and the parties agree that 98,500 gallons of fuel[1] was lost. There is dispute about the number of fish that were killed, but dispite the fact that some witnesses saw none, we believe based on the other testimony, the number was in the thousands. The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* provides:

> "It shall be unlawful for any person or municipality to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person or municipality into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution as herein defined. Any such discharge is hereby declared to be a nuisance." 35 P.S. §691.401

1. The parties have stipulated that gasoline is an "industrial waste" within the meaning of The Clean Streams Law, 35 P.S. §691.1 and is therefore "pollution".

It is clear that the accident here under discussion was nothing more than that—an accident[2]. We have no trouble concluding that there was no willfulness involved. We also find no gross negligence—inasmuch as the pipeline was not visible and there was no plainly visible marker showing the exact location of the pipeline in the river. There was, however, ample evidence of negligence, and we are called upon to assess penalties on that basis.

We will discuss the liability of each defendant separately.

MELE CONSTRUCTION COMPANY

Defendant, Mele, cannot seriously contend that it has no liability but does argue that Mobil was the chief culprit and requests that damages be separately assessed. Mele contends that it is saved harmless by virtue of a contract clause with the Authority, for any damages it may be called upon to pay.[3]

Although the employee who actually ruptured the pipeline testified that he was unaware of its location, he knew or should have known that it was in the general area where he was working because of a previous problem. During construction of the interceptor sewer, Mele workers had hit the pipeline and knocked off some of the coating, which required that a section be replaced. Clearly, Mele was on notice that if it proceeded anywhere in the area of the pipeline without notifying a pipeline employee to get directions, it was proceeding at its own risk. Although there is some question as to whether Mele was even engaged in necessary work at the time of the accident[4], there is no question that it failed to notify Mobil that work was being done

---

2. "Wilfulness", of course, is not necessary for the imposition of a civil penalty. 35 P.S. §691, See *Comm. of PA, DER v. Trindle Construction, Inc.*, EHB Docket No. 74-070-CP-W, issued September 15, 1975.

3. This, of course, is not a proper matter for our resolution. It must be agreed upon between the parties or litigated in another forum.

4. Defendant, Mele, is alleged to have said that the backhoe operator was just fooling around to get his time in for the day.

in the vicinity of the pipeline. It is no answer for Mele to say that it relied upon the permanent markers, for two reasons. First, it had seen the pipeline once before and is charged with some general information regarding location.[5] Secondly, and more importantly, if Mobil had intended for Mele to rely only upon markers, there would be no need for the requirement that it be notified before any work in the vicinity of the pipeline was carried on.[6]

The pipeline takes a sharp curve near the edge of the water and the markers were unreliable for this reason. The problem is that this is the very reason why Mobil insisted upon being present for work near the pipeline. Any misleading information regarding the actual location could properly be cleared up to avoid the very kind of accident which is the basis for this civil penalties complaint. The markers that remained in place at least served the purpose of indicating the general vicinity of the pipeline, and this coupled with the two previous exposures Mele had to the pipeline is sufficient to convince us that Mele caused the discharge of an industrial waste unlawfully and is therefore liable for civil penalties.

MOBIL PIPE LINE

Defendant, Mobil, not unexpectedly, believes it should be absolved from any liability for civil penalties because of Mele's failure to notify it that work was being conducted in the area of the pipeline. It argues that if Mele had done what it was supposed to do, Mobil would have sent someone to the area to oversee the work near the pipeline, and the accident consequently

---

5. Mr. Mele was on hand when 10 to 15 feet of coating had to be replaced on the pipeline and the hole was filled in by Mele in June 1975. N.T. Pages 308-309.

6. Mele also had a specific duty imposed upon it by the Act of 1974, December 10, P.L. 852, No. 287, 73 P.S. §176 *et seq.*, to notify Mobil before doing any backhoe work in the area of the pipeline.

would have been avoided. While we agree with Mobil that perhaps the accident could have been avoided in this way, we also believe it could have been avoided in another way. If Mobil had checked to see if its pipeline markers, placed in April 1975, were still in place after Hurricane Eloise swept through the area on September 30, 1975, it would no doubt have discovered they were not. The steps necessary for the placement of a marker at the bend in the pipeline is obviously a task that takes only a few days, inasmuch as it was belatedly done by Mobil on October 10, 1975, just seven days after the accident.[6]

There is conflicting evidence on just how deep the pipeline was buried at the point of rupture just off the shoreline in the Lackawanna River. Federal regulations[7] require that it be at a depth of 48" from river bottom to the top

---

6. There is also evidence that Mobil placed some wooden markers in sand in May of 1975, but these were of a temporary nature and were also, for unexplained reasons, not in place on October 3, 1975. Federal regulations regarding this matter provide:

> Hazardous Materials Regulations Board, U.S. Dept. of Transportation, 49 CFR Part 195: Transportation of Liquids by Pipeline, §195.410:
> "(a) Except as provided in paragraphs (b) and (c) of this section, each carrier shall place and maintain line markers over each buried line in accordance with the following:...
> (2) The marker must state at least the following: "Warning" followed by the words "Petroleum (or the name of the commodity transported) Pipeline"...the name of the carrier and a telephone number (including area code) where the carrier can be reached at all times. Markers at navigable waterway crossing must also contain the words "Do Not Anchor or Dredge...
> "(c) Line markers that have been installed before April 1, 1970 may be used until April 1, 1975..."

7. U.S. Dept. of Transportation Regulations, 49 C.F.R. §195.248 provides:

> "Cover over buried pipeline.
> "(a) Unless specifically exempted in this subject, all pipe must be buried so that it is below the level of cultivation. Except as provided in paragraph (b) of this section, the pipe must be installed so that the cover between the top of the pipe and...river bottom...complies with the following table...

	Cover (inches) For Normal Excavation	For Rock
Crossings of water with a width of at least 100 feet from high water mark to high water mark	48	18
Any other area	30	18"

of the pipeline. We are convinced that the pipeline was not placed that deep on October 3, 1975. We do not here decide, however, that Mobil has violated federal regulations. We do, however, find that the depth and notice requirements are reasonable and failure to comply with them increased the risk of a violation of The Clean Streams Law, *supra*.

The failure to place or replace proper pipeline notice markers coupled with the depth requirements of federal regulations were as much the causes of the accident as was the failure of Mele to call Mobil for instructions on October 3, 1975. Indeed it can be persuasively argued that Mobil's failure was in part responsible for Mele's. We then conclude that Mobil did violate The Clean Streams Law, Sections 301 and 307 (35 P.S. §691.301, 35 P.S. §691.307).

One final violation by Mobil deserves mention. The Federal regulations[8] require that shut-off valves be located close to the river so as to facilitate the cut-off flow should an event such as here in question occur. The evidence indicates that the shut-off valves were located one and three miles from the river and consequently pollution continued into the river for a considerable period even after the valve was closed because of this distance. Again, we do not here decide whether a federal regulation has been violated, but we do find that the reason for the regulation is so clear that Mobil's failure to heed it was negligence which has caused a violation of The Clean Streams Law.

LOWER LACKAWANNA VALLEY SANITARY AUTHORITY

Having determined that both Mele and Mobil are liable for civil penalties, the question remains whether the Authority which employed Mele to sewer the area under a contract is also liable.

The construction of the interceptor pipe which runs beneath the 18"

---

8. 49 C.F.R. Section 195.260 provides:

> "A valve must be installed at each of the following locations...
> "(e) On each side of a water crossing that is more than 100 feet wide from high water mark to high water mark unless the Administrator finds in a particular case that valves are not justified."

gas pipeline was actually completed on May 21, 1975. The Authority applied for a river encroachment permit which authorized certain work along the disturbed river bank which would return it to its previous condition.

By the terms of the contract between Mele and the Authority, as well as by the lack of control exercised by the Authority over the day-to-day work of Mele, it appears that Mele was an independant contractor.[9] *Comm. v. Mindas Coal Muncy Corp.*, 360 Pa. 7, 60 A.2d 414. The Authority could nevertheless be liable for civil penalties under limited circumstances. *Comm. of PA, DER v. Federal Oil & Gas, et al*, 1975 EHB 186.

DER argues that even though Mele was an independant contractor, the Authority still "allowed" pollution to occur by failing to notify Mobil so that it could precisely locate the pipeline. This was to have been accomplished through the engineering firm which was employed by the Authority, and was specifically instructed by Mobil to give three (3) days notice before any work was done near the pipeline. Whether Betz Engineers, not a party of these proceedings, should be liable for civil penalties is of course not before us, and we have no trouble concluding that the Authority did not cause or allow the discharge of pollution in violation of The Clean Streams Law, because of any action or inaction on its part or on the part of Mele over which it exercised no day-to-day control.

Having concluded that both Mele and Mobil are liable for penalties but that the Authority is not, we must now turn to the question of assessment of these penalties. We found no willful violation of The Clean Streams Law nor did we find anything more than ordinary negligence which led to the 98,500 gallon gasoline spill on October 3, 1975. The maximum penalty which

---

9. Mobil argued that Mele was not an independant contractor, but it is clear from all of the evidence that it was. See also *U.S. v. Penna. Environmental Hearing Board*, 584 F.2d 1273 (1978).

we could impose under these circumstances is $10,000[10] on the two parties responsbile. The evidence indicates a fish kill high into the thousands valued by DER at $2,674.73. Balanced against this is the fact that there was no permanent damage done to the river, and that it was completely recovered from the incident in a matter of months. This board is concerned, of course, that a penalty not be so low in dollar amount that one would be tempted to use less care (or save money in not relocating a pipeline) rather than opt to protect the environment even at substantial cost.

Although there were other costs necessarily incurred by DER in its investigation of this incident because of the on-going functions of DER and its employee relationship, it would be difficult to arrive at an accurate

---

10. The statute provides at 35 P.S. §691.605, Act of June 22, 1937, P.L. 1987, *as amended*:

> "In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors. It shall be payable to the Commonwealth of Pennsylvania and shall be collectible in any manner provided at law for the collection of debts. If any person liable to pay any such penalty neglects or refuses to pay the same after demand, the amount, together with interest and any costs that may accrue, shall be a lien in favor of the Commonwealth upon the property, both real and personal, of such person but only after same has been entered and docketed of record by the prothonotary of the county where such is situated. The department 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."

figure,[11] although $1,601.49 is suggested prior to November 14, 1975. Costs thereafter are estimated to be another $1,500 to $2,000.

We are convinced, considering all of the evidence, that Mobil which in the first instance failed to meet its responsibilities regarding the depth of the pipe and marking its location, should bear the greatest burden. We therefore will impose a penalty of $5,000 on Mobil. Mele is almost equally responsible because after gaining knowledge of the pipe's location and the hazard it created, nevertheless failed to give required notices or to otherwise exercise due care. We will impose a separate penalty of $3,500.00 on Mele.

The separate penalties assessed upon Mobil and Mele total $8,500.00 out of the total of $10,000.00 which the majority feels could be assessed on the basis of the Department's Complaint. By assessing 85% of the possible maximum penalty the majority has underlined the seriousness of the short term but damaging spill described above and has, it is hoped, provided sufficient deterrance to other similarly situated companies.

On the other hand, the majority is reluctant to assess the full $10,000.00 in a case where acquatic damages and clean-up costs do not equal that amount and where the defendants' conduct, though negligent was not wilful in the sense of *Rushton Mining Company, et al, infra*, i.e., in the sense indicating knowledge of a discharge to the waters of the Commonwealth.

---

11. Items included in DER's estimate of expenses are:

Acquatic survey	$650.00
Travel	82.80
Motel	16.96
Field Work	210.73
Office Time	100.00
Meals	19.00
Labor Fees	522.00

CONCLUSIONS OF LAW

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

2. Defendant, Mele Construction Company, Inc. violated Sections 301 and 307 of The Clean Streams Law, 35 P.S. §691.301, §691.307, by causing the discharge of 98,500 gallons of gasoline into the Lackawanna River on October 3, 1975.

3. Defendant, Mobil Pipe Line Company, violated Sections 301 and 307 of The Clean Streams Law, 35 P.S. §691.301, §691.307, by permitting through its negligence, the discharge and the continuing discharge of gasoline into the Lackawanna River on October 3, 1975.

4. Defendant, Lower Lackawanna Valley Sanitary Authority, did not violate The Clean Streams Law either directly or indirectly through actions of Mele Construction Company, Inc., an independant contractor.

5. Under The Clean Streams Law, 35 P.S. §691.605, civil penalties may properly be assessed for any violation thereof, in an amount not to exceed $10,000.

ORDER

AND NOW, this 2nd day of July , 1980, Civil Penalties are hereby imposed on Mele Construction Company, Inc. in the amount of three thousand five hundred dollars ($3,500.00) and upon Mobil Pipe Line Company in the amount of five thousand dollars ($5,000.00) for violations of The Clean Streams Law, *supra*, and the regulations of the Department of Environmental Resources.

This amount is due and payable into The Clean Water Fund immediately. The Prothonotary of Lackawanna County is hereby ordered to enter these penalties as liens against any property of the aforesaid defendants, Mele Construction Company, Inc. and Mobil Pipe Line Company, with interest at the rate of 6% per

annum from the date hereof. No costs may be assessed upon the Commonwealth for entry of the lien on the docket.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

BY: PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: July 2, 1980

DISSENTING OPINION

By: Thomas M. Burke, Member

I respectfully dissent as I am convinced that under the facts of this case a substantial civil penalty should be assessed against both Mele Construction Company, Inc. and Mobil Pipe Line Company. The findings by the majority opinion that the spill was caused by "nothing more than...an accident" and that "there was no willfulness involved"evidence a misapplication of the facts of this case to the various degrees of volition that this board has considered in the past. In *Commonwealth of Pennsylvania, DER v. Rushton Mining Company, et al*, EHB Docket No. 72-361-CP-D (issued March 12, 1976) we stated:

> "Thus, although an act may not be wilful in the deliberate or intentional sense, there may be a degree of wilfulness evident from knowledge that certain consequences are likely to result if that act is done in this manner or from failure to take the care that is required to avoid likely injurious consequences from that act. In tort law, these various degrees of knowledge and care lead to distinctions of degree such as "gross negligence" and "wanton misconduct" or "reckless disregard of safety", see *Evans v. Philadelphia Transit Company, supra, Geelan v. Pennsylvania Railroad Company*, 400 Pa. 240, 161 A.2d 595 (1960); *Kasanovich,*

admx. v. George et al Trustees, 348 Pa. 199, 203, 734 A.2d, 523 (1943); Restatement of Torts 2nd Vol. 2, §500. As to gross negligence, Prosser has pointed out:

> "The prevailing view is that there are no 'degrees' of care or negligence as a matter of law; there are only different amounts of care as a matter of fact, and "gross" negligence is merely the same thing as ordinary negligence, 'with the addition', as Baron Rolfe once put it, 'of a vituperative epithet'." *Torts, p. 183, 1971 Ed.*

> Gross negligence in fact appears to be the failure to take slight care to avoid an injury, whereas wanton misconduct or reckless disregard of safety, as it is captioned in the Restatement, involves an added element of actual knowledge of facts that would lead a reasonable man to conclude that injury will be likely to result from the doing of a certain act or the failure to do a certain act."

See also the board's opinion in *Treverton Anthracite Company v. DER*, EHB Docket No. 76-116-CP-W (issued January 24, 1978) affirmed at 42 Pa. Commonwealth 84, 4 A.2d 240 (1979).

Here, Mele knew that a dangerous high pressure gasoline pipeline was located in the excavation area, it knew that extraordinary care was necessary when working there, it knew that the work should be performed under the direction of a Mobil employee and it knew that when prior excavation was performed under the direction of a Mobil representative, the Mobil representative directed that the excavation in the immediate area of the pipeline be performed by hand. Nevertheless, Mele operated a backhoe in the general location of the pipeline without notification to Mobil. In my opinion Mele's actions manifest a reckless disregard for their consequences.

Mobil is charged with a duty to exercise a high degree of care in the operation of its high pressure gasoline pipeline as the pipeline, without proper care, presents a hazard to the public. Mobil breached that duty when it failed

to take the care required by regulations of the United States Department of Transportation governing the marking of pipelines, depth of burial of pipelines and the location of shutoff valves. Those regulations are intended to prevent the type of spill which occurred here or, in the case of location of shutoff valves, to minimize its affect.

The natural and forseeable consequence of the actions of Mele with the backhoe and of the failure of Mobil to comply with the aforesaid regulations is the spill which occurred here destroying approximately 13,000 fish. I do not believe that the civil penalty provision of The Clean Streams Law will ever have a general detterent effect on the actions of the defendants and persons similarly situated so long as the board assesses penalties of $5,000 and less on facts such as those that exist here. In light of the magnitude of the spill and because the spill was caused by the failure of the defendants Mele and Mobil to exercise the care required under law, I would assess a $10,000 civil penalty against each defendant.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS BURKE
Member

DATED: July 2, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GILPIN TOWNSHIP and
FRANK RAVOTTI

Docket No. 78-129-B

THE CLEAN STREAMS LAW
SEWAGE FACILITIES ACT

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By: Thomas M. Burke, Member, July 23, 1980

Gilpin Township has appealed two actions of the Department of Environmental Resources (DER) requiring the implementation of public sewage service in certain areas of Gilpin Township. The DER actions appealed are: (1) an order dated September 12, 1978 requiring Gilpin Township and the Gilpin Township Sewage Authority to install, on a specified schedule, facilities for the collection of sewage in Gilpin Township and its conveyance to the Kiski Valley Water Pollution Control Authority Sewage Treatment Plant; and (2) a letter dated September 27, 1978 from DER advising Gilpin Township that no further permits for on-lot sewage disposal systems may be issued until Gilpin Township begins implementation of the approved sewage plan.

Appeals also were filed from both DER actions by Frank Ravotti, a resident of Gilpin Township. On January 3, 1980 we dismissed Ravotti's appeal

at EHB Docket No. 78-134-B from the DER letter which notified Gilpin Township of the prohibition against issuance of on-lot disposal permits for the reason that Ravotti lacks standing to pursue the appeal. See our Opinion and Order dated November 30, 1979 and Order dated January 3, 1980 wherein we stated that it is not sufficient for a person claiming to be aggrieved to assert the common interest of all citizens in procuring obedience to the law and that appellant Ravotti did not allege any circumstance which showed that the DER letter of September 27, 1978 adversely affected him.

On December 29, 1979 we consolidated the remaining appeal of Frank Ravotti and the two appeals of Gilpin Township at EHB Docket No. 78-129-B. Two days of hearings were held on the appeals. Gilpin Township and the DER filed post-hearing briefs.

Ravotti neither participated at the hearings nor presented any testimony in support of the allegations stated in his notice of appeal. His appeal is therefore dismissed for failure to prosecute same.

Based on the evidence adduced at hearing and the briefs filed by the parties we enter the following:

FINDINGS OF FACT

1. Appellant is Gilpin Township (Gilpin) a second class township in Armstrong County.

2. Appellee is the DER, the agency entrusted with the duty to enforce the provisions of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §690.1 *et seq.* and the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.*

3. Gilpin Township Sewage Authority (Gilpin Authority) is a municipal authority created pursuant to the Municipal Authority's Act of 1945, the Act of May 2, 1945, P.L. 382, 53 P.S. §301 *et seq.*

4. In August, 1969, the Armstrong County Planning Commission prepared the sewer and water plan for Armstrong County providing, *inter alia*, that by 1979 Gilpin will provide sanitary sewer service to a regional sewage treatment plant.

5. On January 15, 1971, Gilpin adopted the sewer and water plan for Armstrong County as the official plan for Gilpin Township pursuant to §5(a) of the Sewage Facilities Act.

6. Ordinance No. 26 adopted in December, 1972, by Gilpin Township directed the Authority to plan, acquire, construct, finance, and operate a system of sanitary sewers in Gilpin.

7. Chester Engineers, Inc. submitted an application for a Pennsylvania Water Quality Management Permit on behalf of the Gilpin Authority, which was issued as Permit No. 0374405.

8. On December 13, 1974, the DER issued Permit No. 0374405 to Gilpin Authority to construct a sewer system to serve the Guffy Run, Brady Run and Elder Run Watershed areas of Gilpin Township.

9. Kiski Valley Water Pollution Control Authority (Kiski Valley Authority) is an authority formed by 13 municipalities, including Gilpin, whose purpose is to convey and treat sewage from these municipalities in accordance with the requirements of The Clean Streams Law, *supra*.

10. On July 1, 1973, Gilpin entered into a service agreement with the Kiski Valley Authority whereby the Authority would construct a sewage treatment plant to which Gilpin would connect the sewer lines built within the service area.

11. On July 21, 1973, Gilpin adopted Ordinance No. 31 providing that it is unlawful to employ any means of disposal of sewage other than through the

sewers to be constructed by the Kiski Valley Authority and to be connected to a sewage treatment plant operated by the Kiski Valley Authority.

12. The Kiski Valley Authority has constructed and is operating a sewage conveyance and treatment system consisting of a sewage treatment plant and trunk sewer lines to the various member municipalities.

13. The Kiski Valley Authority system is available for Gilpin to connect the sanitary sewer lines in accordance with the provisions specified in the service agreement dated July 1, 1973 between the Kiski Valley Authority and Gilpin.

14. In June, 1977, following the approvals of the governing bodies of Washington Township, Oklahoma Borough, Parks Township and Gilpin Township, the Kiski Valley Authority acting as lead applicant for these municipalities, made application through the DER to the United States Environmental Protection Agency for a grant for funds pursuant to the Federal Water Pollution Control Act to be utilized for the payment of 75% of the eligible cost of construction of sanitary sewers in these municipalities, which grant would include those facilities covered by Permit No. 0374405.

15. On September 27, 1977, the U.S. EPA approved the aforesaid grant application.

16. Notice of the grant application and estimated costs for the proposed sanitary sewer system were published in accordance with federal notice requirements.

17. Pursuant to P.L. 92-500, a public hearing on the proposed sanitary sewer project was held on May 18, 1977.

18. Gilpin has not built the sewer system described in Permit No. 0374405.

19. The Gilpin Authority has not undertaken the construction, financing, and operation of a sanitary sewer system in Gilpin.

20. There exists no municipal sewage treatment system in Gilpin Township.

21. Septic tanks are the predominant method of sewage disposal in Gilpin Township.

22. The characteristics of the soils in Gilpin render a large part of the soils unsuitable for subsurface on-lot disposal systems.

23. Twenty-two soil samples were examined in the Gilpin sewer project area. All of the soils were found to be unsuitable for conventional subsurface sewage disposal systems and 15 of the soils were found to be unsuitable for any subsurface sewage disposal system.

24. A sewage survey of the project area showed that 340 of the 479 houses observed had malfunctioning subsurface sewage disposal systems.

25. Raw sewage enters Brady Run from homes in the Georgetown area of Gilpin Township and raw sewage lies in the yards and along the banks of Brady Run in the Georgetown area.

26. Brady Run exhibits excellent water quality conditions with no evidence of sewage except in the Georgetown area of Gilpin Township.

27. Fecal coliform, in numbers greatly exceeding the allowable limits for effluent from a sewage treatment plant are present in sewage discharges from subsurface disposal systems located at residences in the Gilpin Township sewer project area.

28. Elder Run, a stream in Gilpin Township, shows evidence of nutrient enrichment from sewage.

29. Sewage stimulated growths are responsible for lack of habitat for sensitive organisms in Elder Run in the general area of the Hills Consolidated School.

30. Fecal coliform are present in the streams of Gilpin Township in numbers greatly exceeding the allowable limits for effluent from a sewage treatment plant.

31. Gilpin Township was one of 13 municipalities requesting the construction of the Kiski Valley sewage treatment plant.

32. Seventy-five percent funding for eligible costs of the proposed sewer system has been awarded by the federal government and is presently available to finance the Gilpin Township sewer project.

33. The application submitted by the Gilpin authority for federal funding included a 1972 feasibility study and a 1977 update to that study. The feasibility study considered different methods of sewage treatment and determined that the construction of sewers to the Kiski Valley plant is the most economical and reasonable way to provide sewage to Gilpin Township.

34. The proposed sewer system would serve approximately 640 residents in Gilpin Township.

35. Neither Gilpin Township nor Gilpin Authority has submitted an alternative plan to the DER to revise Gilpin's sewage facilities plan.

36. Gilpin Township does not have any plans to construct the sewage collection system mandated by its sewage facilities plan or any other sewage abatement system.

37. The Gilpin Authority borrowed $250,000 from the First National Bank of Leechburg in order to finance the preparation of the necessary plans and specifications for the sewage abatement project mandated by the Sewage Facilities Act.

38. Gilpin Township through the vehicle of a purchase order agreement between Gilpin Township and the Gilpin Township Authority guaranteed or sponsored the repayment of the loan to the First National Bank of Leechburg.

39. In July, 1973 Gilpin entered into an agreement with the Kiski Valley Authority wherein the Authority agreed to construct and operate a sewage treatment plant with sufficient capacity to treat the sewage from Gilpin Township and Gilpin committed itself to pay the rates necessary to finance the construction and operation of the sewage treatment plant in proportion to its use.

DISCUSSION

Gilpin Township is located in Armstrong County between the Allegheny and Kiskimentas rivers, approximately 26 miles northeast of Pittsburgh. It has a population of approximately 4,000 persons. For waste disposal its residents use on-lot systems as there are no public sewage facilities available within Gilpin. Gilpin, from 1969 until approximately May 1978 had been proceeding with the planning for a public sewer system. However, in the spring of 1978 Gilpin refused to proceed any further. Gilpin's refusal to proceed with public sewerage prompted the dispute with the DER which resulted in the issuance of the September 12, 1978 order which is the subject of this appeal.

There is a real need for a public sewer system in Gilpin Township. A survey conducted between April 11 and April 18, 1978 by three DER inspectors showed that 340 out of 479 homes observed had sewage pooling on the surface of the ground or flowing into roadside ditches and streams. A soil condition investigation was performed by a DER soil scientist in September, 1979. Twenty-two soil samples were examined in the area proposed to be sewered. All of the soils tested were found to be unsuitable for conventional sewage disposal systems and 15 of the soils were determined to be unsuitable for any subsurface sewage disposal system. The investigation corroborates a soil survey performed by the United States Department of Agriculture Soil Conservation Service in Gilpin

Township in April 1978. The Soil Conservation Service study approximated that only 7.4% of the area may be suitable for conventional subsurface absorption areas, that 41.5% might be suitable for alternate subsurface systems and that about 51% is probably unsuitable for any subsurface sewage disposal system. The high percentage (71%) of malfunctioning on-lot systems are consistent with, and probably could have been predicted from, the results of these soil studies.

The three DER inspectors who conducted the April, 1978 survey also took water samples from sewage discharge pipes and samples of sewage pooled in ditches to determine the presence of fecal coliform. The numbers of fecal coliform, which is an indication of the presence of fecal contamination from the intestines of warm blooded animals or man, were found to be very high.[1] High fecal coliform levels were also found in the streams of Gilpin Township.[2] The DER also commissioned an acquatic survey of Gilpin Township streams. Although some of the areas sampled showed excellent water quality the acquatic biologist noted that Elder Run receives sewage in sufficient amounts to be detected. His observation on Brady Run is succinct and explicit:

> "The fourth station was in Georgetown where Brady is crossed by T562 at the second bridge in Georgetown. Raw sewage was observed entering the stream from almost every residence. Raw sewage in drains and depressions caused a rank odor to permeate the area. In defiance of this abomination, Brady Run maintained a good water quality as reflected in the biological

---

1. For comparison purposes, the DER regulations allow an average fecal coliform level of 200 organisms per 100 milliliters in the effluent of a sewage treatment plant and no more than 1,000 organisms in 10% of the samples tested. Here, only 4 of the fifty samples showed less than 20,000 fecal coliform and 30 of the samples had levels higher than 100,000.

2. Nine of nineteen samples taken in Gilpin Township streams show fecal coliform levels higher than 10,000 organisms/100 milliliter and fourteen of the samples showed more organisms than the 1000/100 ml. std.

> profiles. Sensitive taxa were still abundant with little evidence of any changes. This is probably a phenomenon of the time of sampling with cold water and high dissolved oxygen permitting the downstream drift and apparent permanent residence of these taxa. Summer temperatures no doubt eliminate all but the hardy taxa from the area."

In sum the evidence presented by the DER demonstrates a serious sewage pollution problem. The malfunctioning of on-lot sewage systems by such a high percentage of residences, the high coliform count in water samples collected in roadside ditches, streams and even backyards, and the unsuitability of the soils for on-lot systems, all evidence an obvious need for a public sewage system.

The Pennsylvania Sewage Facilities Act, *supra*, requires every municipality to adopt a plan showing how it intends to dispose of sewage within its boundaries. Gilpin Township fulfilled its obligation by authorizing the Armstrong County Planning Commission to include Gilpin Township in a county-wide sewerage plan. By resolution of council dated January 15, 1971, Gilpin Township adopted the Armstrong County plan as its own. That portion of the Armstrong County plan applicable to Gilpin Township thus became the sewage facilities plan required of Gilpin Township by the Sewage Facilities Act. The plan proposes that the sewage be collected in Gilpin Township and conveyed to a regional sewage treatment plant.

Until 1978 Gilpin Township was proceeding efficaciously to implement its sewage facilities plan. In 1972, it employed Chester Engineers, Inc. to perform a study to determine the feasibility of installing a public system in Gilpin. The study recommended constructing sanitary sewers in three drainage areas, Guffy Run, Brady Run and Elder Run. These sewers would be connected by an interceptor to a treatment plant to be constructed by the Kiski Valley Water Pollution Control Authority (Kiski Authority). Chester's feasibility study concluded that with the help of federal grants the system was economically

feasible at a cost per customer of $137.00 per year.[3] The study recommended that the Township proceed to implement the plan without delay because of continuing rising construction costs and the present availability of federal grants.

In March 1974 Gilpin submitted an application to the DER's Bureau of Water Quality Management for a permit to construct the sewage collection and conveyance system suggested by the feasibility study and Gilpin's sewage facilities plan. Gilpin submitted with the permit application an application for a federal construction grant. In December 1974 the DER issued Permit No. 03744051 to Gilpin Township to construct the sewage system. During the same time period, Gilpin Township and twelve other area municipalities, formed the Kiski Authority for the purpose of the construction and operation of a regional sewage treatment plant for the treatment of sewage from the member municipalities. A service agreement was signed between the Kiski Authority, and the members of the Authority including Gilpin, committing the Authority to finance, construct and operate the regional plant and appurtenant trunk lines and committing the 13 member municipalities to pay the rates necessary to finance the construction and operation of the plant in proportion to their use of the plant. The regional plant, known as the Kiski Valley Sewage Treatment Plant, was financed by an 8.8 million dollar grant from the Federal Environmental Protection Agency, a one-half million dollar grant from the Appallachin Regional Commission of the federal government and the issuance of 6.5 million dollars in bonds by the Authority. It has been constructed with capacity to serve the residents of Gilpin Township and is presently serving the sewage needs of other member municipalities.

Gilpin's application for a 75% grant was initially rejected because of the limited amount of federal funds, but was later approved when resubmitted

---

3. The 1972 feasibility study was supplemented by another feasibility study of the project in 1977. The 1977 feasibility study also concluded that construction of sewers to the Kiski Valley plant is the most economical and reasonable way to provide sewage to Gilpin Township.

by the Kiski Valley Authority as one segment of a project encompasing three other area municipalities. Gilpin has had an outstanding offer of 75% funding from the EPA for the sewer system since September 1977. Thus, Gilpin has progressed to the stage where it is able to let bids for the actual construction of the sewage project. Nevertheless, it now refuses to proceed; it argues that it needs time to do another feasibility study to determine if there is a less costly method of abating its sewage problems.

In response to a motion to limit issues filed by the DER prior to hearing we stated that we would not receive testimony on the financial inability of Gilpin Township to abate its sewage problems because the courts have time and time again held that financial inability is not a defense to a DER order to abate untreated or inadequately treated sewage discharges. See *Ramey Borough v. Commonwealth of Pennsylvania, DER*, 466 Pa. 45, 351 A.2d 613 (1976); *Commonwealth ex rel Alessandroni v. Borough of Corfluence*, 424 Pa. 540, 234 A.2d 852 (1967); *Commonwealth of Pennsylvania v. Borough of Reynoldsville*, 39 Pa. Commonwealth Ct. 318, 395 A.2d 333 (1979) and *Commonwealth ex rel Sennett v. Borough of Irwin*, 91 Dauph. 270 (1969). In general, the courts have held that people must dispose of their sewage in a sanitary and healthy manner in consideration of their own well-being and that of their neighbors, no matter what the cost. Nevertheless, since the DER order at issue requires the construction of a specific sewerage system, we held that Gilpin could offer testimony to show the availability of alternative, less costly means of abating the sewage discharges.

In the presentation of its case Gilpin did not offer any evidence on the cost of an alternate system or even the cost of the proposed system. Its testimony only demonstrated the detrimental effect on Gilpin of the Supervisor's

actions in stopping the project.[4] In 1974 the Gilpin Authority borrowed 250,000 dollars from the First National Bank of Leechburg to seed the project, that is, to pay for such items as preliminary plans, specifications, applications for permits, grants and feasibility reports. Gilpin Township acted as a guarantor of the loan since the Gilpin Authority had no income. Ordinarily the loan would be re-paid from the federal grant, as the preliminary work is eligible for a federal grant at a 75% rate, and from fees assessed to the users of the sewerage system. Since the project was stopped, there is no EPA grant and there are no users of the system. As a result Gilpin has defaulted on the loan and is faced with a threat by the bank to confiscate township equipment. In an attempt to raise money to satisfy the bank, Gilpin has increased its property tax by 2 mills and has instituted a $10.00 per capita tax. Gilpin also has been sued by its engineers for failure to pay for services performed. The plans, specifications, etc. for the system were performed by Chester Engineers, Inc. The contract with Chester required that twenty percent of the money due, approximately 56,000 dollars was to be paid upon completion of the final plans and specifications. It was not paid and Chester was forced to sue Gilpin. Chester and Gilpin settled for $31,000, approximately 50 cents on the dollar. Gilpin has since asked Chester to perform another feasibility study, but Chester, understandably, has advised that it will not perform another study until it is assured Gilpin has the money available to pay for it. Gilpin is also in breach of the service agreement it signed with the Kiski Authority. Additional costs were sustained by the Kiski Authority in order to construct the treatment plant large enough to service

---

4. Progress on the project was stopped in approximately May, 1978 when four of the five supervisors of Gilpin and the seven member sewage authority resigned, apparently in response to protests from residents of Gilpin Township against the cost of sewers. Four new supervisors were appointed the same month by the Armstrong County Court of Common Pleas, however they decided not to pursue the sewer project.

Gilpin. Someone now has to pay those additional costs;if not the residents of Gilpin Township, then the residents of the other member municipalities will be assessed a higher charge.

The Pennsylvania Sewage Facilities Act, *supra*, and The Clean Streams Law, *supra*, require that we sustain DER's order and dismiss appellants' appeals. The Commonwealth Court in *Kidder Township v. DER*, 41 Pa. Commonwealth Ct. 376, 399 A.2d 799 (1979) and *Carroll Township v. DER*, _____ Pa. Commonwealth Ct. _____, 409 A.2d 1378 (1980) held that a municipality cannot raise as a defense to an order requiring the implementation of its sewage facilities plan, the unsuitability of the plan. Rather, the municipality must revise its plan in accord with the revision procedures set forth in the Sewage Facilities Act. The Court determined that the revision procedures set forth in the Sewage Facilities Act provide an exclusive revision course. Thus, Gilpin Township cannot assert, in this appeal from an implementation order, that it desires to revise its official sewage facilities plan; it can only revise its plan through the revision procedures set forth in the Sewage Facilities Act.

Also, the DER has effectively sustained its burden of proof under Section 203 of The Clean Streams Law which states that:

> "...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."

The DER has shown that there is a present need for a sewer system in Gilpin; it also has shown that the system specified by the order is not only required by the Sewage Facilities Act, but was initially proposed by Gilpin, conforms

with the Armstrong County sewer and water plan and is eligible for a 75% grant by the federal EPA.

Moreover, after a review of the record it appears to us that it is clearly not in the interest of Gilpin residents for the Gilpin Supervisors and Authority members to continue to delay the implementation of this sewer plan. There is little doubt that Gilpin must soon install a system to treat its sewage. The longer it delays, the more inflation will increase the cost as it surely has over the past two years. A potential consequence of the delay which should be of utmost concern to the officials of Gilpin, is the placing of federal grant offer in jeopardy. If the grant offer is withdrawn, the cost of the project to the residents of Gilpin will increase by approximately a factor of four. The action of Gilpin has already resulted in an unnecessary increase in taxes to its residents in order to pay off the bank loan. We sincerely trust that the officials of Gilpin will reconsider their opposition to the sewer system.

We also dismiss appellants' appeal from the DER's September 27, 1978 letter. The letter merely advises Gilpin Township of the applicability of 25 Pa. Code 71.32(a) to the area of Gilpin Township where its sewage facility plan requires a public sewer system. Section 71.32(a) provides that:

> "The local agency shall not issue permits for individual or community sewage systems unless the system proposed is consistent with the official plan of the municipality in which said system is to be located and the municipality is adequately implementing the official plan. In the event that the municipality has no plan or has not revised or implemented its plan as required by the rules and regulations of the Department or by order of the Department, no permits may be issued under section 7 of the act in those areas of the municipality for which an official plan, revision thereto or implementation thereof is required, until the municipality has submitted the said official plan or revision to, and received the approval of, the Department, or has commenced implementation of its plan or revisions in accordance with a schedule approved by the Department."

Gilpin Township is not implementing its official sewage facilities plan, and therefore it is within the discretion of the DER to advise Gilpin Township of the 25 Pa. Code 71.32(a) on-lot disposal system permitting restrictions.

CONCLUSIONS OF LAW

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

2. Under Section 5 of the Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.*, Gilpin Township must submit to the DER an officially adopted sewage facilities plan which provides 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.

3. The Sewage Facilities Act, *supra*, provides an exclusive course for revising a municipality's sewage facilities plan.

4. The unsuitability of a sewage facilities plan is not a defense to a DER order mandating the implementation of the plan.

5. Financial inability is not a defense to an order issued under The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §690.1 *et seq.* mandating the abatement of untreated or inadequately treated sewage discharges.

6. The DER has carried its burden of proof under The Clean Streams Law, *supra*, by showing a present need for a sewage system and by showing that the sewage system specified by the order is the system specified by Gilpin Township's sewage facilities plan.

O R D E R

AND NOW, this 23rd day of July, 1980, it is hereby ordered that the appeal of Gilpin Township from the DER September 12, 1978 order is dismissed and the appeal of Gilpin Township from the September 27, 1978 letter of DER is dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

BY: THOMAS M. BURKE
Member

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: July 23, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GERRIT J. BETZ :

:

: Docket No. 79-173-W
: Pa. Sewage Facilities Act
: 25 Pa. Code 71.17

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONEWAGO TOWNSHIP BOARD OF SUPERVISORS,
Intervenor

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

By Paul E. Waters, Chairman July 23, 1980

This matter comes before the board as an appeal from the refusal of DER to order Conewago Township to amend its Act 537 plan, and allow appellant Gerrit J. Betz, to install a private or package treatment plant for sewage disposal. DER has refused to order the requested revision pursuant to Title 25 Pa. Code 71.17, based on appellants failure to provide certain information regarding the use of the balance of the tract in question and other matters. The Township opposes the revision because appellants proposed mobile home facilities and recreation area is not in keeping with its development plans and because appellant failed to comply with its Mobile Home Park and Subdivision Ordinances.

FINDINGS OF FACT

1. The appellant in this matter is Gerrit J. Betz.

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter DER).

3. The intervenor is Conewago Township, Dauphin County, Pennsylvania.

4. On February 4, 1977, the subdivision plan for the Aaron Grubb property was recorded in Plan Book X Vol. 2, pages 30 and 30A.

5. After the approval of the Aaron Grubb subdivision plan, appellant Gerrit J. Betz (Betz) acquired an option to buy the property.

6. In 1978, Betz submitted a new subdivision plan, providing for a Ramada Inn and Campground, to the Township for approval.

7. The Supervisors refused to approve the new subdivision plan for the Ramada Inn and Campground on a portion of the original tract.

8. The plan was disapproved by Conewago Township Board of Supervisors at a meeting held June 12, 1978.

9. On April 19, 1979, Betz requested the Department to order the Supervisors to revise the on-lot water and sewage disposal system that had previously been approved for Aaron Grubb's property to allow a package treatment plant.

10. On October 2, 1979, the department, by Mr. Timothy Finnegan, Sewage Facilities Consultant for its Bureau of Community Environmental Control, denied the request because of the following reasons:

a. The present on-lot water and sewage disposal system was sufficient under the approved subdivision plan of Aaron Grubb. Any change in the on-lot water and sewage disposal system would not conform to the applicable subdivision regulations of Conewago Township as well as the local ordinance regarding mobile home parks.

b. The Supervisors' concerns as to Mr. Betz's plans for the remainder of the 54 acre tract were not adequately addressed.

c. The proposed effluent discharge failed to meet the current stream quality criteria as stated by Terry R. Fabian, the Regional Water Quality Manager, in his letter of June 15, 1978.

11. The DER wants to consider the remainder of a property owner's tract and surrounding development in considering appropriate methods of sewage disposal as a matter of good planning.

12. The appellant did not supply the department with its plans for the remaining acreage of appellant.

13. The department has the discretion to allow conventional on-site systems discharging in excess of 10,000 gallons of sewage per day.

14. The private request for a change in the Township plan under the Sewage Facilities Act was denied on the basis of a failure to address the remainder of the tract, the apparent failure to meet ammonia-nitrogen effluent requirements and violation of the Municipal Mobile Home Park and Subdivision Ordinances.

15. The ground in question to be developed consisted of Lot No. 6 of 19.3 acres and Lot No. 5 of 4.9 acres as contained in the subdivision plan.

16. For the subject parcel of real estate the present Township requirement for sewage disposal is subsurface sewage disposal.

17. The module components show a discharge of 22,000 gallons per day for appellants proposed project.

18. Title 25 Pa. Code, Chapter 73.11 (f) prohibits subsurface discharge in excess of 10,000 gallons per day.

19. One Lot (Lot No. 3) has been sold off of this subdivision plan and is no longer under the control of the developer.

20. Conewago Township was aware that the subdivision plan for this tract was recorded prior to its rejection of the plan.

21. The developer did prepare a feasibility study as to the mode of sewage treatment and its decision for such a mode of treatment was based upon economic factors, reliability and ultimate design capacity respecting future flow demand.

22. Although effluent criteria were not received by appellant until after plan rejection, the sewage disposal plant can comply with the DER regulations by simple modification.

23. Conewago Township does not have a municipal sewage system and it would not be economically feasible to connect a sewage system for this subdivision with that of another township.

24. Although it may be more expensive for a developer to utilize a package plant rather than an on-site disposal system, on-site disposal cannot be utilized for this tract in accordance with the developer's present plans.

DISCUSSION

Appellant is here seeking a second bite at the development apple. In February 1978, appellant submitted a subdivision plan to intervenor Conewago Township for a Ramada Inn and Campground along Legislative Route 22007 in Conewago Township. Although appellant owns or controls a 54 acre tract of land, the proposal was for only 24 acres. On June 12, 1978, the plan was rejected by the Township for a number of reasons [1] including the failure to indicate what, if any, use would be made of the balance of the tract. The other reasons stated by the Township either addressed sewage disposal problems or failure of the proposed plan to conform to the Township's Mobile Home Park Ordinance. Potential traffic congestion was also raised but its importance to the Township's decision was unclear. On April 19, 1979, appellant requested DER to order the Township to amend its sewage plan filed pursuant to the Penna. Sewage Facilities Act, [2] Act of January 24, 1966, P. L. 1535, *as amended*, 35 P.S. §750.1, *et seq.*, to allow the use of a private treatment plant to serve the proposed Ramada Inn and Campground. [3] The present plan provides only for on-lot sewage disposal, and appellant deems this not to be feasible. [4]

---

1. There were 9 reasons outlined in the Township rejection letter.

2. The Act provides: Section 5 (b), 35 P.S. §750.5 (b)
"Any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise its official plan. The request to the department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the official plan's inadequacy. Such person shall give notice to the municipality of the request to the department."

3. No appeal was taken to the Common Pleas Court from the Township's subdivision plan refusal.

4. Because of the 10,000 gallon per day limit, appellant might have to install three systems to accommodate a projected 22,000 gallon per day flow, and this would create further problems regarding separation distances of these systems.

DER refused the appellant's request because the proposed change of sewage disposal methods would not conform to the Township's applicable subdivision regulations or its mobile home park regulations; because the proposed effluent limitations failed to meet the current quality criteria; and because of the Supervisor's concerns as to Mr. Betz's plans for the remainder of the 54 acre tract. The appellant questions all three of DER's reasons for refusal.

Generally, DER and therefore this Board need look no further than whether the proposed subdivision has been approved by the Township as evidenced by the issuance of subdivision plan approval. See 25 Pa. Code §71.17(c) 3 and *Borough of Sayre v. DER* 9 D&L 3d 407. Clearly, the Township, rather than DER or this Board, is authorized to make land use decisions under the Municipalities Planning Code, 53 P.S. §10101 *et seq.* (See *Community College of Delaware County v. Fox*, 342 A.2d 468 (1975)).

The complicating factor in this case, is that many of the reasons for the Township's refusal to approve the appellant's subdivision plan relate to the proposed sewage disposal method for the proposed project. If these were the only significant reasons for the refusal, a would-be developer would be placed in the position where he would have no forum in which to review the sewage facilities issues, since the Township could maintain upon an appeal from its planning decision under the Municipalities Planning Code, that the sewage facilities issues could not be raised in that proceeding due to appellant's failure to exhaust his statutory and administrative remedies under the Sewage Facilities Act and Section 71.17.

We think that Commonwealth in *Fox supra.* designated DER and thence this Board as the route for addressing sewage facilities problems, whereas the Township and the Courts of Common Pleas provide the path for addressing land use problems. Moreover, to deny a developer an effective method for challenging local sewage facilities decisions would seem to deny procedural due process on the basis of the reasoning set forth in *DER v. Trautner* 19 Pa. Commonwealth Ct. 116, 338 A.2d 718 (1975).

With the above in mind, this Board in the instant matter will look past the Township's subdivision planning decision to examine the non-sewage facilities reasons stated by the Township for rejecting the subdivision plan. In addition, the Board will also examine the other reasons listed by DER for rejecting appellant's request.

One reason given by DER for its refusal to order the Township to amend its Act 537 plan can be quickly set aside. DER had stated that the effluent from the proposed private sewage treatment plant would not meet water quality standards[6] regarding ammonia-nitrogen. DER and appellant were able to agree that the limit should be 1 milligram per liter from June through October and 3 milligrams per liter for the rest of the year. The planning module submitted to DER was amended by stipulation to provide for this,[7] and there seems to be no serious dispute that this limit can be met by the proposed plant.

---

5. §71.17 Private request to revise or supplement plans.
"(a) Any person who is a resident or property owner in a municipality may request the Department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the sewage disposal needs of the resident or property owner. The request to the Department shall contain a description of the area of the municipality in question and an enumeration of all reasons advanced by said person to show the inadequacy of the official plan.
(b) Upon receipt of a private request for revision or supplement, the Department shall notify the appropriate municipality and shall request written comments from the municipality to be submitted within thirty (30) days.
(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...."

6. At one time it was believed that the receiving stream was intermittent, but it was found to be year-round at the point of proposed discharge.

7. Although the Township declined to join this stipulation (N.T. 125, 126) there was no evidence presented to contradict the representation.

Although DER stated the failure to comply with local ordinances, as another reason for its refusal to order an Act 537 plan amendment, apparently it refers primarily to the Conewago Township Subdivision Ordinance of 1965. The issue of whether the Township Mobile Home Park Ordinance also is applicable, is raised primarily by the Township. We have reviewed the ordinance and note that it is concerned with regulating non-transient mobile homes.[8] We believe that to the extent, if any[9] that DER's refusal was based on appellant's alleged failure to comply with this ordinance, it was improper. Appellant proposes, as we understand it, to create facilities for transient guests. Although the ordinance does refer to such facilities, it is only "in conjunction" with a mobile home park as previously defined.

The key question raised by both the Township in denying subdivision approval, and DER in refusing to order the Township to revise its sewage plan, is—what, if any, development will occur on the balance of this 52 acre tract? DER deems itself entitled to this information because it is charged with coordinating planning for the sanitary disposal of sewage wastes with a comprehensive program of water quality management. 35 P.S. 750.3(3). It must be kept in mind that the whole purpose for the limitations and requirements of the law in this

---

8. The ordinance in question, No. 71-1 (Exhibit S-2) defines mobile home as: "A transportable single family dwelling unit which may be towed on its own running gear, and which may be temporarily or permanently affixed to real estate, used for non-transient residential purposes, and constructed with the same or similar electrical, plumbing and sanitary facilities as immobile housing."

9. It seems that DER originally believed the ordinance to be applicable and hence used the plural "ordinances" when referring to appellant shortcomings. At the hearing and in its post-hearing brief, it may have abandoned this position.

area, is for planning, to meet present and future sewage disposal needs.[10] It is clear that DER may properly require a party seeking an order under 25 Pa. Code 71.17 to provide information on the future prospects for a contiguous tract under the control of such party before reversing the decision of the local municipality. Moreover, this appears to be a proper non-sewage facilities related reason for the Township's refusal of appellant's subdivision approval.

Therefore, we conclude that although we are unable to determine to what extent the Township relied upon matters in addition to those here discussed in refusing subdivision approval, it is clear that DER properly refused to order a 537 Plan revision without further information on the future use of the balance of the 52 acre tract here in question.

We therefore conclude that DER did not abuse its discretion in refusing to order the Township to amend its sewage facilities plan.

---

10. The regional coordinator of the Sewage Facilities Act for DER stated: (N.T. 24, 25 Lines 1-25)

"My concern was that it was possible that the Ramada Inn and Campground could become part of a larger project that may have been anticipated at that time by Mr. Betz, or that it may have been part of a larger growth area within Conewago Township that I wasn't aware of."

"Q. But you didn't make any inquiry of the developer to find out what the situation was. Is that the bottom line on that?"

"A. That's correct, since it had been mentioned by the township originally in their comments and since the private request that I received I assumed included all the information that Mr. Betz wanted to have me consider."

"Q. If you did not make Mr. Betz aware that you were concerned about the other 30 acres, how could he address it, since his module restricted him to 24 acres?"

"A. Well, the question was already asked by the township. It was repeated by the township. You got a copy of their comments before the decision was made, and I believe you even responded to the Department after the township comments were made. I can find that letter from you. Basically, I think you said that it was of no concern and the Department shouldn't consider it."

"Q. I believe that is correct."

"A. I felt I was in a position where I had to have that information available one way or the other."

O R D E R

AND NOW, this 23rd day of July, 1980, the appeal of Gerrit J. Betz in the above captioned matter is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

By: PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: July 23, 1980

Gerrit J. Betz

CONCURRING OPINION

By: Thomas M. Burke

I concur in the conclusion that the appeal should be dismissed because I believe that the DER has the discretion to refuse to order a municipality to revise its sewage facilities plan if the requested provision would not be compatible with the approved and recorded subdivision plan for the tract of land in question and that the DER under 25 Pa. Code 71.17 should give deference to a lawful refusal by the municipality to revise its subdivision plan. An exception would exist where the municipality refuses to approve a revision to the existing subdivision plan for the sole reason that the revision would not comply with a municipality's sewage facilities plan. In that case a DER deference to the municipality would result in the circumvention of any remedy for appellant. That does not appear to be the circumstance here as the municipality's denial of the subdivision request was based on reasons other than comformance with the sewage facilities plan, including the lack of information on the future use of the balance of the tract.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: July 23, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF EAST UNION :

:

: Docket No. 79-117-W

: Pa. Sewage Facilities Act
25 Pa. Code 71.17

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and COVE VILLAGE, Permittee

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

By: Paul E. Waters, Chairman , August 1, 1980

This matter comes before the Board as an appeal from the issuance of a Water Quality Management permit and order issued by DER requiring East Union Township, appellant herein, to amend its Act 537 sewage plan to provide a sewer extension to serve Leisure Equities Corporation formerly known as Cove Ski Village. Cove Village is located in a portion of the township which is about one half mile from the farthest point to which appellant wants to extend sewer service, mainly because of financial reasons.

FINDINGS OF FACT

1. Appellant, the Township of East Union is located in Schuylkill County Pennsylvania.

2. Appellee is the Department of Environmental Resources hereinafter DER .

3. Permittee, Cove Village is owned by Leisure Equities Corporation and is also known as Cove Ski Village and Cove Vacation Village.

4. On March 8, 1974, DER issued an order directing East Union Township to revise its official sewage plan to provide for the future sewer needs of the Township, including Ski Village.

5. No action or appeal was taken by the Township from the 1974 order.

6. In a resolution for plan revision filed by the township in 1975 and submitted to DER, the township indicated that a Module for Land Development for Leisure Equities subdivision "conforms to applicable zoning, subdivision and other municipal ordinances and plans, and to a comprehensive program of pollution control and water quality management".

7. On May 1, 1978, referring to the Leisure Equities subdivision, the township advised DER —" The Planning Module may be in all aspects proper but it will not be made a part of the official plan of East Union Township.

8. Leisure Equities Inc. intends to construct sewer lines to connect to a treatment plant located in North Union Township, to serve its proposed subdivision.

9. East Union Township officials who opposed the plan revision were under the mistaken impression that approval of the Act 537 amendment would obligate it to construct, operate and maintain a treatment plant to serve the subdivision in question.

10. The Chairman of the Board of Supervisors of East Union Township would have raised no objection to the sewage plan amendment here in question if it had been known that the proposal called for connection to the North Union Township treatment plant.

DISCUSSION

Because Leisure Equities, Inc. was unable to get appellant East Union Township to amend its Act 537 plan to allow for development of a vacation village subdivision, it asked DER to order the same 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 25 Pa. Code [1] 71.17. The issues are somewhat confused, because the appellant township sent a number of conflicting signals, and indeed continues to do so.[2] As long ago as March 8, 1974, DER directed appellant to revise its Act 537 plan to adequately provide for the present and future sewage needs of the township, including the property then known as Cove Ski Village, permittee herein. Although no appeal was taken from that order, no action thereon was taken either. In May 1978, a planning module for the subdivision here in question was submitted to DER and although the township argues that it did not formally approve the plan revision, it did state that the planned subdivision—"conforms to applicable zoning, subdivision, other municipal ordinances and plans, and to a comprehensive program of pollution control and water quality management." While DER did not officially order the township to amend its Act 537 plan it did subsequently state[3] that—"the Department deems the township to have adopted the Planning Module for Land Development as a revision to the township's official Sewage Facilities Plan—". DER on July 10, 1979 issued to Leisure Equities, Inc. a Water Quality Management permit for the extension of sewer lines in the Cove Vacation Village. It is from this latter action that Appellant has filed this appeal. Appellant

---

1. The Regulations provide for a private request to have DER order the municipality to approve a plan revision under certain conditions.

2. Near the conclusion of the hearing, certain statements by the appellant, which will be more fully discussed later, seemed to indicate that this whole matter had been a big mistake.

3. In a letter dated July 10, 1979 from DER to the Secretary of East Union Township.

did nothing to bring more clarity to its position when it indicated the appeal to be of--"that part of the Order of July 10, 1979 of the Bureau of Community Environmental Control which concluded that the township agreed to a revision of its township official Sewage Facilities Plan."[4]

Based on the appeal, the testimony at hearing and the final brief filed on behalf of appellant, we conclude that the township has seen vacation developments come and go. When they come, financial burdens are placed upon the citizenry to provide services and when they go the township is left to shoulder whatever problems are left behind. To put the matter in less mundane and more legal jargon, the township feels it can not afford the cost of providing needed sewer service. It, however is much too late to rely on this argument with success. *Ramey Borough v. Dept. of Environmental Resources*, 15 Pa. Commonwealth Ct. 601, 327 A.2d 647 (1974); aff'd 466 Pa. 45, 351 A.2d 613 (1975).

We also conclude that appellant has no serious objection to the project itself---so long as it doesn't cost appellant anything. In fact, there is some reason to believe, that if appellant had understood it would have no responsibility to construct and operate treatment facilities, this entire matter may not have arisen.[5]

The final argument made by appellant seems to boil down simply to a negative reaction against DER efforts to administer the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*. We find no merit in it and we will therefore dismiss the appeal.

---

4. Statement from original appeal filed August 9, 1979.

5. In questioning the Chairman of the East Union Township Supervisors, the following testimony was given: (N.T. page 31 line 3-25, N.T. page 32 1-11)

"Q. Mr. Houser, were you aware that the request of Leisure Equities

CONCLUSIONS OF LAW

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

2. Under the Pennsylvania Sewage Facilities Act and 25 Pa. Code DER may properly order a municipality to amend its Act 537 plan to provide for the sewage disposal needs of a developing portion of the township despite the fact that the township deems the cost to be prohibitive.

---

5. Continued
Corporation for revision to your Act 537 plan was merely for the installation of a collection system in the Cove Woods section of the project, and not for the installation of treatment facilities? Did you know that?"

"A. No."

"THE EXAMINER: Did you say that you did not know that?"

"THE WITNESS: No."

BY MR. VAN LUVANEE:
"Q. Were you under the impression that the request by Leisure Equities Corporation would have involved the construction of sewage treatment facilities, as opposed to collection facilities in East Union Township?"

"A. Well, I was of the impression, as we all were, that you people were supposed to hook onto our sewer system."

"Q. Would you have had any objection to the request if the request was to hook onto the sewer plant which is servicing this project and is located in North Union Township?"

"A. No."

"Q. That would not have bothered you. You were just concerned that Leisure Equities wanted to hook into the system that East Union Township presently operates; is that correct?"

"A. Well, they are not operating one."

"Q. Let's see if I can rephrase that. Your objection was that the Leisure Equities Corporation might ultimately come to East Union Township and demand sewer service from the Township; is that correct?"

"A. Right."

"Q. You have no objection -- would it be correct that you as of today have no objection to Leisure Equities Corporation hooking into the sewer plant that they themselves constructed in North Union Township?"

"A. No."

3. Where the township has failed or refused to approve an Act 537 plan amendment although specifically acknowledging that it meets all local requirements, DER may properly issue a Water Quality Management Permit to allow a sewer extension for the subdivision in question.

4. East Union township filed the appeal based, at least in part, upon certain mistakes of fact, and the other objections to amending its Act 537 plan having been found to be without merit, the appeal must be dismissed.

O R D E R

AND NOW, this 1st day of August, 1980, the appeal of East Union Township is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: August 1, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DOVER TOWNSHIP BOARD OF SUPERVISORS
RICHARD WALTERSDORFF AND
DERRY ASSOCIATES, et al.

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

Docket No. 78-090-W

PA SEWAGE FACILITIES ACT
25 Pa. Code 94.11, 94.22

ADJUDICATION

By: Paul E. Waters, Chairman, August 1, 1980

These matters come before the board as appeals from decisions of the department to deny sewer extensions, and plan revisions that would require discharges to the Dover Township sewage treatment plant which is alleged to be hydraulically overloaded. The various appeals, all arising from the same plant capacity limitations, were consolidated for hearing. Although none of the appellants presently have building permits for the homes they desire to construct, there are various reasons why they deem themselves entitled to the relief they request.

FINDINGS OF FACT

1. Appellants are: Richard H. Waltersdorff, Inc., a corporation with offices at Green Briar Road, York, PA (hereinafter Waltersdorff); Derry

Associates, a general partnership with offices at Pikesville, Maryland (hereinafter Derry); and the Board of Supervisors of Dover Township, York County (hereinafter Township).

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

3. On July 3, 1978 DER disapproved a plan revision that had been adopted by Dover Township as part of its official plan under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq.*

4. The plan revision was for the development of a twelve-lot residential subdivision known as "Donwood", located in Dover Township.

5. The basis for DER's disapproval of the proposed plan revision for Donwood was that extension of the public sewer of the Dover Township sewage system was proposed for the subdivision and that a hydraulic overload existed at the Dover Township sewage treatment plant.

6. On July 5, 1978 DER disapproved another proposed plan revision adopted by Dover Township as a revision to its official plan under the Pennsylvania Sewage Facilities Act. The plan revision was for an eighty-one-lot residential subdivision known as "Emig Mill Manor Phase II", proposed by appellant.

7. The basis for the denial of the Emig Mill Manor plan revision was that extension of the public sewer of the Dover Township sewage system was proposed for the subdivision and that a hydraulic overload existed at the Dover Township sewage treatment plant.

8. On December 13, 1978, DER refused to approve an application for a sewer extension permit for a development known as "Rainbow Hills Subdivision, Section 2" owned by Derry Associates and located in West Manchester Township, York County. The basis for DER's action was the existing hydraulic overload at

the Dover Township sewage treatment plant, to which sewage from the project would be conveyed.

9. On July 3, 1979 DER disapproved a proposed plan revision for a residential development of Richard H. Waltersdorff known as Country Club West-Garrison Drive" located in Manchester Township, York County. The basis for the disapproval was that the Dover Township sewage plant, to which sewage from the project would be conveyed, was in a projected overload status.

10. The appellants filed timely appeals of DER's actions and on September 6, 1979 these appeals were consolidated under the present caption.

11. The hydraulic capacity of the Dover Township sewage treatment plant is 1.75 million gallons per day (mgd).

12. In June of 1978, the Dover Township Sewer Authority submitted its annual report to DER pursuant to Chapter 94 of Title 25 of the Pennsylvania Code.

13. The 1978 Annual Report of the Dover Township Sewer Authority projected that a condition of hydraulic overload would be reached at the sewage treatment plant by 1982.

14. A condition of actual hydraulic overload developed much sooner than projected in the Township's annual report. From January 1 to January 30 of 1979, the average daily flow to the sewage treatment plant was 3.39 mgd. From January 31 through March 1, 1979, the average daily flow to the plant was 2.15 mgd. From March 2 through March 31, 1979, the average daily flow to the plant was 2.69 mgd.

15. Derry Associates is a developer engaged in the development of land in the Township of West Manchester pursuant to approved subdivision plans under the title "Section II, Rainbow Hills".

16. Derry Associates has received sewer permits for 32 of the 66 lots contained in Section II, Rainbow Hills.

17. There was no existing hydraulic overload at the receiving treatment plant in Dover Township during the period June 1978 through and including December 1978, when the applications here in question were made, and were denied by DER.

18. A hydraulic overload was determined to exist at the receiving treatment plant in Dover Township during the period January through March 1979, on the basis of measurements of the reported flows through the plant as calculated on the basis of three consecutive thirty-day averages.

19. The discharge monitoring reports indicate that the flows through the receiving treatment plant in Dover Township dropped below capacity in May 1979 and June 1979, reflecting no hydraulic overload during those months.

20. The most recently available information indicates that there is presently no hydraulic overload at the Dover Township treatment plant.

21. Pursuant to the terms of a Manchester Township Ordinance, Derry Associates has paid money to West Manchester Township for the purpose of reserving sewer capacity since the enactment of the aforesaid Ordinance in December 1976, at the rate and in the amount of $76 per year per lot for the 34 lots in question.

22. A presently existing and approved development, Shiloh East, which development is also in West Manchester Township, has 56 unused sewage permits issued by DER for connections to the receiving treatment plant in Dover Township.

23. By letter dated January 4, 1979, West Manchester Township wrote to the Environmental Hearing Board in response to the action of DER in denying the sewage permit applications of Derry Associates and, in the course of that letter, indicated that the treatment capacity presently available, as a result of the Shiloh East development's connection to the city of York treatment plant,

instead of the receiving treatment plant in Dover Township, should be transferred to Derry Associates.

DISCUSSION

Although we have five separate appeals, each arises because of a hydraulic overload which occurred at the Dover Township sewage treatment plant in York County, Pennsylvania. The plant in question has a treatment capacity of 1.75 mgd and it was expected to reach this load by 1982 according to the annual report of the Dover Township Sewer Authority. In fact, the monthly reports for January 1 through March 31, 1979 indicated that the plant exceeded the 1.75 capacity[1] by substantial amounts. Appellants cannot reasonably maintain that the plant was not hydraulically overloaded during this period.[2]

The appeal of Derry Associates was filed on December 29, 1978 from the refusal of DER by letter of December 13, 1978 to approve an application for a sewer extension to serve Section II Rainbow Hills for an additional 34 homes,[3] in West Manchester Township. Although DER based its permit denial on the hydraulic overload, appellant argues that the first overload did not actually occur until January 1979. Although this is true, appellant has overlooked 25 Pa. Code §94.11, which provides:

---

1. In January the average daily flow was 3.39 mgd, February 2.15 mgd and March 2.69 mgd.

2. The regulation 25 Pa. Code 94.1 defines "Hydraulic overload" as:

> "The condition that occurs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based, or when the flow in any portion of the system exceeds its hydraulic carrying capacity during a recent three-month period."

3. Derry Associates has already received permits for 32 of its 66 lots.

> "A sewer extension shall not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations, or other portions of the sewer system to become overloaded."

Inasmuch as there was no actual hydraulic overload at the Dover Township treatment plant until March of 1979,[4] did DER abuse its discretion in refusing sewer extensions as early as June of 1978? This question can only be answered by some reference to 25 Pa. Code 94.2 and 94.11 which are concerned with a "projected overload" as the basis for a sewer extension denial. Regulation 94.2 states the purpose of the chapter as follows:

> "This chapter is intended not only to limit additional extensions and connections under conditions of actual or projected overload but also to prevent, as much as possible, the occurrence of such overloads."

The regulations set up a requirement for the filing of an annual report by sewage plant permittees, as a mechanism for DER to determine whether there is a projected hydraulic overload.[5] It is clear that if substantial overloading is to be accomplished, obviously the only time such overload can be prevented is before the 1.75 mgd capacity is reached. The very nature of the problem makes foolproof or precise judgments impossible. When we view the actions of

---

4. Although the plant exceeded its permitted capacity in January 1978, the definition for "hydraulic overload" in the Regulation 25 Pa. Code 94.1 is:

> "The condition that occurrs when the hydraulic portion of the load, as measured by the average daily flow entering a sewage treatment plant, exceeds the average daily flow upon which the permit and the plant design are based, or when the flow in any portion of the system exceeds its hydraulic carrying capacity during a recent three-month period."

5. Section 94.12 provides that this report be filed by June 30 of each year and include *inter alia* "(i) A projection of the anticipated hydraulic loading on the sewage treatment plant for each of the next five years."

DER in December in the light of what actually happened in January, Febuary and March, 1979 we cannot say that it abused its discretion regarding implementation of the regulation above cited. *Kravitz v. DER*, EHB Docket No. 77-118-W (October 30, 1978). We believe this to be the quintessential case for application of the regulation. If it did not serve to put the brakes on further development under the circumstances of this case one would be hard pressed to find proper application of the provision. Derry further argues that inasmuch as the Dover Township plant did fall below its treatment capacity level for a number of months subsequent to DER's permit denial, this board should now remand the matter to DER in order to determine whether there is present capacity to be allocated. This presents a more difficult decision. We have followed a similar procedure recently in *Borough of Mercer and Mercer Borough Sewage Treatment Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources and County of Mercer*, EHB Docket No. 79-070-S (issued June 6, 1980). In that case there was a newly constructed public facility which needed immediate sewer service,[6] and there was some indication that the sewer ban itself could be lifted if further newly acquired evidence as to reduction in hydraulic load could be presented to the board.[7]

In *Mercer, supra*, the board was concerned with a sewer ban that was issued based on a hydraulic overload. We deem the prohibition of sewer extensions, with which we are here concerned, based also on a hydraulic overload, to be an analogous situation. We there said:

> "Perhaps, in the months between the date of the hearing and the date of this Adjudication, there has been a continuing and effective program which has resulted or will result in the overall reduction of this overload. At this posture, however, we have no basis upon which to conclude that such a program

---

6. The county had just completed a badly needed addition to its juvenile detention center.

7. Further hearings were ordered to take place within 20 days, to allow appellants further opportunities to show results of on-going flow reduction programs.

exists. As such, we hold that this second element necessary for ban modification under Section 94.41 (3) has not been established."

In this case there is some evidence that the hydraulic overload is being abated subsequent to the peak periods of January, February and March 1979. In fact judging by the latest available figures, the plant is not in a hydraulically overloaded status.[8]

---

8. On cross-examination the chief witness for DER testified as follows:

"Q Now, isn't it a fact that in May of '79 the flow dropped to 1.285 average?

A Yes.

Q And in June of 1979 it dropped to 1.113?

A Yes.

Q Now, do you know the reason for the drop in the flow for those months?

A The specific reason I do not know, okay. It could be a combination of several things.

Q And what might they be?

A Extraneous flow entering the sewer system, such as infiltration inflow.

Q Well, could it be could one of the reasons be that the various townships took steps to correct infiltration?" (Notes of testimony, page 21)

"THE WITNESS: Would you repeat the question?

BY MR. STERLING:

Q I asked, Is there a possibility that the townships have taken steps to prevent the flow of any infiltration?

THE EXAMINER: Would that account for the drop in the figures, is what he's asking. Could that account for the drop in the figures?

THE WITNESS: It's possible that that may have had an effect.

Although we do not reject the conservative approach taken by DER in this matter, it does appear as though there was in June of 1978,[9] and that maybe there still is, some growth capacity, to be allocated at the Dover plant. With this in mind we will not simply dismiss the appeals for the failure of appellants to carry their burden of proof, but, following Mercer[10] we will

---

8. continued

"BY MR. STERLING:

Q Have you been in touch with the Dover Township sewer plant or their engineer or with any of the townships concerning any infiltration problems?

A Yes, I have.

Q And as a result of your contact, do you know whether they've taken any steps?

A I believe they have taken some steps, okay. Whether or not that's going to be effective in removing this infiltration inflow is another story.

Q Well, you can't predict whether it will be or won't; isn't that a fact?

A (Gesture).

THE EXAMINER: Your answer?

THE WITNESS: That's correct.

MR. STERLING: That's all I have at this time." (Notes of testimony, pages 22 and 23)

9. Although the plant capacity is 1.75 mgd, one three month period's figures following June 1978 were: September .839
October .801
November .823

10. We there said, page 20:

"We remand because it is clear to this Board that there now must be in existence sufficient data which can be analyzed to determine whether steps have indeed been taken which have resulted in the reduction of the overload condition at this plant on an on-going basis. Furthermore, DER should now be in a position that it has evaluated the overload

remand the case to DER for reconsideration in light of any updated monthly flow data.

The final argument of appellant Derry is that certain reserved capacity evidenced by 56 sewer permits at the Dover Township treatment plant, which was to be used by one Shiloh East development, is no longer needed and should therefore be made available for its (Derry's) development. West Manchester Township apparently has an ordinance which requires substantial payments in advance to reserve sewer capacity for each building lot. Also, Derry presently has 34 such lots, on which payments have been made yearly since 1976 to reserve capacity but no permits were actually issued as was done for Shiloh East. Although West Manchester Townshp, where the building is to occur, favors the transfer of the alleged sewer capacity, from one builder to another, we cannot reach that question unless and until such capacity is shown to actually exist—i.e. that there is presently no hydraulic overload. Until such time, we deem this argument to be without merit.

CONCLUSIONS OF LAW

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

2. Pursuant to 25 Pa. Code 94.11 and 94.22 DER may properly refuse sewer extension permits based on a projection of hydraulic overload as well as a presently existing overload.

---

10. continued
reduction plan submitted by the Borough. Finally, unless the County was less than candid about carrying through its plan to inspect and, possibly, correct additional portions of its sewage collection line, DER should now have information about the effect of such a program on the hydraulic overload condition at this plant."

3. Inasmuch as substantial discretion is given to DER under the above provision, it may be required by this board to closely monitor monthly sewage flow reports and allocate remaining capacity based on the most current data available.

4. Where there has been no showing that there is sewage treatment capacity remaining at a plant alleged by DER to be hydraulically overloaded, the board will not determine whether sewage permits or reserved capacity can be transferred from one prospective builder to another.

O R D E R

AND NOW, this 1st day of August , 1980, the appeals in the above matter are hereby remanded to DER for further consideration consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: August 1, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ADAM GREECE d/b/a
CHERRY RUN FUEL COMPANY

Docket No. 79-149-B

THE CLEAN STREAMS LAW

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Thomas M. Burke, Member, August 8, 1980

This matter comes before the board on an appeal by Adam Greece from an order issued by the Department of Environmental Resources (DER) under The Clean Streams Law, the Act of June 22, 1937, P.L., 1987, *as amended*, 35 P.S. 691.1 *et seq.*, requiring Greece to seal the portal of a mine previously worked by Greece, doing business as Cherry Run Fuel Company, in order to stop the discharge of acid mine drainage.

A hearing was held in Pittsburgh and both parties have filed post-hearing briefs. Based thereon we hereby find as follows:

FINDINGS OF FACT

1. Appellant is Adam Greece, an individual residing in Apollo, Westmoreland County, Pennsylvania. Adam Greece owned and operated the Garretts

Run Mine under the name of Cherry Run Fuel Company from 1959 through 1968.

2. Appellee is the Commonwealth of Pennsylvania, DER, the agency entrusted with the duty to enforce the provisions of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. 690.1 *et seq.*

3. The Garretts Run Mine is a deep coal mine located in Manor Township, Armstrong County, Pennsylvania.

4. In 1966 Greece applied for a mine drainage permit pursuant to The Clean Streams Law, *supra*, for the Garretts Run Mine. As a part of the application, Greece submitted a mine closure plan which called for sealing each of the three portals in the mine with a waterproof barrier of 12-inch masonary block and covering the seal with 15 feet of backfill material. The mine closure plan was submitted to the Sanitary Water Board, a predecessor agency of the DER, on or about May 24, 1967.

5. On January 8, 1968, Mine Drainage Permit No. 367M040 was issued to Cherry Run Fuel Company for the Garretts Run Mine. The permit required compliance with the May 24, 1967 mine closure plan as well as certain general conditions referenced in the permit.

6. The Garretts Run Mine was closed in October 1968.

7. Adam Greece testified that Clarence Kelly, an employee of the Pennsylvania Department of Mines and Mineral Industries, inspected and approved the mine-sealing procedure used by Greece on the three portals.

8. In 1968 the Pennsylvania Department of Health was responsible for the inspection of mines to determine compliance with The Clean Streams Law, *supra*, and mine drainage permits.

9. Adam Greece installed the seals on all three portals himself, with no assistance, using his own hands and one highlift. It took Greece two weeks to install the seals.

10. Greece constructed the seals of 16-inch concrete blocks covered with fifteen feet of backfill material.

11. The concrete seals were not inspected by anyone from the Department of Health prior to the seals being covered by the 15 feet of earthen material.

12. An inspection by a DER water quality specialist in December 1973 showed that mine drainage was discharging from one of the portals at a rate of 20,000 gallons per day. Inspection reports in DER's files show that the mine had been discharging acid since at least 1971.

13. The acid mine drainage is continuous and continues to occur at the present time.

14. The mine drainage discharge has a pH of approximately 3 and an iron content which ranges from 50 to 135 mg/l.

15. The discharge from the Garretts Run Mine portal flows into a tributary of Rupp Run and thence to Rupp Run.

16. The discharge from the Garretts Run Mine pollutes the receiving stream in the following ways:

a) Due to the high iron content of the discharge, the stream bottom is coated with iron precipitate below the discharge point;

b) Due to the low pH of the discharge, the pH of the stream below the discharge point violates the applicable water quality criterion, although it meets the criterion above the discharge point;

c) Due to the high iron content of the discharge, the iron level in the stream below the discharge point violates the applicable water quality criterion, although it meets the criterion above the discharge point.

17. An inspection of the mine seal by Roger Higbee a DER hydrogeologist in June 1979 revealed that the cement blocks were placed with the center holes horizontal rather than verticle, which allowed mine drainage to pass directly through the seal.

18. The mine acid discharge from the Garretts Run Mine portal, was caused by the placement of the cement blocks on their side rather than in an upright position which allowed the holes in the blocks to act as a conduit of mine drainage through the seal.

19. The DER since at least 1974 has sent various letters to Greece requesting that he correct the condition which is enabling the mine drainage to flow from the Garretts Run Mine.

DISCUSSION

This case involves the question of the responsibility of an operator of a deep coal mine for a discharge of acid drainage from the mine after its closure. It is before the board on an appeal from a DER order requiring appellant to file with the DER for approval, and after approval to implement, a plan designed to seal a portal from which acid mine drainage is presently discharging.

Adam Greece, appellant, doing business as the Cherry Run Fuel Company, operated a deep coal mine known as the Garretts Run Mine in Manor Township, Armstrong County, Pennsylvania from 1959 until its closing in October 1968. The Garretts Run Mine was operated under Mine Drainage Permit No. 367M040 issued under The Clean Streams Law, *supra*, by the Sanitary Water Board of the Department

of Health.[1] One of the provisions of the permit was a requirement that each of the three portals in the mine be sealed at the time of closing with a waterproof barrier in accordance with a plan submitted by Greece. The plan provided for a waterproof seal made up of 12-inch masonary block tied into the roof, floor and sides of the mine. The seal was to be located fifteen feet inside of the mine portal and compacted with fifteen feet of earthen material.

Nevertheless, an inspection by a DER employee in December 1973 revealed that acid mine drainage was discharging from one of the portals at a rate of 20,000 gallons per day. Subsequent inspections have shown the discharge to be continuous and to be occurring at the present time. Also, inspection reports in DER's files indicate that the discharge has existed since at least 1971.

The discharge has had a deleterious effect on the receiving stream, a tributary of Rupp Run, in that the discharge is both acid and high in iron. The pH has generally been running at about 3 and the iron content ranges from 50 to 135 mg/l. (The DER regulations prohibit a pH lower than 6 and an iron concentration higher than 7 mg/l. See 25 Pa. Code 99.33.) The mine drainage has coated the stream bottom with a yellow iron precipitate and has raised the content of iron and lowered the pH to a level violating the specified water quality criteria of the stream; noncomformance with water quality criteria is indicative of a polluted stream.

Until recently the discharge flowed from a 15-foot long, 2-inch plastic pipe inserted by a road maintenance employee of Manor Township into the earthen embankment to within 3 or 4 feet of the seal. In June 1979 DER employees removed the plastic pipe which caused the erosion of the earthen embankment and the ex-

---

1. The DER in 1970 assumed the duties previously vested in the Sanitary Water Board and the Department of Health by Section 1901-A of the Administrative Code, the Act of December 3, 1970, P.L. 834, 71 P.S. §510-1.

posure of the seal. An examination of the seal showed that some of the concrete blocks were placed with the center holes horizontal rather than vertical enabling mine drainage to pass directly through the seal. Roger Higbee a DER hydrogeologist testified that in his opinion there was "no doubt" that the discharge of mine drainage from the portal was caused by the placement of the cement block in such a position that the center holes acted as a conduit for the drainage.

The DER's August 29, 1979 order was issued under the authority of Section 315(a) of The Clean Streams Law, *supra*, which provides in pertinent part:

> "No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the board or such person or municipality has first obtained a permit from the department... A discharge from a mine shall include a discharge which occurs after mining operations have ceased, provided that the mining operations were conducted subsequent to January 1, 1966 under circumstances requiring a permit from the Sanitary Water Board...The operation of any mine or the allowing of any discharge without a permit or contrary to the terms or conditions of a permit or contrary to the rules and regulations of the board, is hereby declared to be a nuisance."

Appellant argues that he is not responsible under Section 315 of The Clean Streams Law, *supra*, for the acid mine discharge because he did not "cause" the discharge. He contends that the concrete blocks were installed correctly by him; that they had to have been disarranged by a third person intruder. To support or corroborate his testimony that the blocks were laid properly, Greece testified that the seals in all three of the mine's portals were inspected and approved by Clarence Kelly a Commonwealth mining inspector. As an adjunct to his factual analysis, appellant proffers the legal argument that Section 315 cannot impose "absolute liability" upon an operator; he asserts that there must be some "responsibility" for the discharge. In support thereof appellant points to the Commonwealth Court's opinion in *Philadelphia Chewing Gum Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 35 Pa.

Commonwealth Ct. 443, 387 A.2d 142 (1978) where the Commonwealth Court evidences a disposition against an interpretation of Section 316 of The Clean Streams Law, *supra*, which would impose liability on a property owner for the abatement of a nuisance existing on his property, solely on the basis of his ownership.

Initially, we do not find appellant's testimony that he properly installed the masonary blocks in an upright position to be creditable. We agree that there does not appear to be any reason why an operator would install the blocks in a way that does not provide a seal, unless it was done inadvertently; however we have difficulty giving credence to the suggested alternative that an intruder unearthened the fifteen-foot cover and disarranged the masonary blocks that form the seal. Greece's testimony is, in actuality, uncorroborated; his testimony that the seals were approved by Kelly is, of course, hearsay and thus entitled to only limited weight. Also, Kelly was an inspector for the Department of Mines and Mineral Industries and as such would be concerned with the seal's function as a barrier to block access into the mine. In the normal course of his duties he would not be concerned with enforcement of The Clean Streams Law, *supra*, mine drainage permits or acid mine drainage. Those concerns were the responsibility of inspectors from the Department of Health.

Moreover, and of primary importance, a determination of the cause of the break of the closure seal is not germane to the determination of liability here. The responsibility for abating the acid mine discharge is not dependant upon the efficacy of appellant's construction of the portal seal. Section 315 of The Clean Streams Law, *supra*, places upon the mine operator the responsibility for abating acid discharges from his mine, either during or after the completion of the operation of the mine, irregardless of the reason for the discharge. The

actions of a third party can't diminish that obligation. Appellant may have a cause of action against an intruder but as between the operator and the Commonwealth, the operator must abate the post-mining discharge. The leading case on the obligation of a mine operator for a post-mining discharge is the Pennsylvania Supreme Court's decision in *Commonwealth of Pennsylvania v. Barnes and Tucker Company*, 455 Pa. 392, 319 A.2d 871 (1974). In *Barnes and Tucker*, the Pennsylvania Supreme Court, while reversing a Commonwealth Court decision, held that a coal operator is responsible for abating an outbreak of acid mine drainage from a mine after the cessation of its operation and after the mine has been closed and sealed. The Court found that a post-mining discharge is a statutory nuisance under Section 3 of The Clean Streams Law, *supra*, as well as a common law nuisance. It opined that the absence of facts supporting the concepts of negligence, forseeability or unlawful conduct is not fatal to finding liability and the fact that Barnes and Tucker operated in accordance with The Clean Streams Law, *supra*, during the operation of the mine does not remove the operator's responsibility. In a subsequent decision by the Supreme Court assessing liability for the same acid discharge, *Commonwealth of Pennsylvania v. Barnes and Tucker*, 472 Pa. 115, 371 A.2d 461 (1977), the Court affirmed a Commonwealth Court decision imposing upon a mine operator a duty to treat 7.2 million gallons per day of acid discharge from a closed mine. In response to the operator's argument that the cause of the outbreak of acid water was fugitive water flowing into its mine, the Supreme Court quoted with approval the Commonwealth Court's opinion stating:

> "Whether the impelling force which produced the public nuisance is solely or partially that of fugitive mine water flowing into and adding to the generated water of that mine, *the conduct of Barnes & Tucker in its mining activity remains the dominant and relevant fact without which the public nuisance would not have resulted where and under the circumstances it did.*"
> Id. 371 A.2d at 467 (Emphasis in original)

Thus, the imposition of the responsibility to abate post-mining acid discharges is not dependant on the conduct of the operator in the operation of its mine or the construction of its closure barriers but stems entirely from the fact that a mine was operated. The rational for the imposition upon the operator of liability for post-mining discharges was enunciated by the Pennsylvania Supreme Court in *Commonwealth of Pennsylvania v. Harmer Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973). The Court stated:

> "If the operator of a mine need not treat these discharges, pollution will not end and the general public will be subjected to either the continued degradation of its surface waters or be forced to subsidize the coal industry by paying for treatment of this polluted water through its taxes....The public interest is not served if the public, rather than the mine operator, has to bear the expense of abating pollution caused as a direct result of the profitmaking, resource-depleting business of mining coal." Id. 306 A.2d at 320

Appellant's case is not helped by the interpretation of Section 316 of The Clean Streams Law, *supra*, given in *Philadelphia Chewing Gum Corporation v. Commonwealth of Pennsylvania, supra*. The Pennsylvania Supreme Court issued its opinion in *Philadelphia Chewing Gum Corporation v. Commonwealth*, on April 24, 1980, at _____ Pa. _____, _____ A.2d _____ (Nos. 66 and 67 Jan. Term 1979). The Court reiterated that a property owner's responsibility for a condition to be regulated is not an important consideration in determining his liability for abating the condition, under Section 316 of The Clean Streams Law.[2] The Court stated:

> "It is appropriate that a property holder's responsibility has little significance in determining the validity of the state regulation. In criminal law, of course, inquiry into a defendant's 'culpability' is at the core of guilt determination and punishment. In the field of tort law, the notion of 'fault' is not an inappropriate limitation on liability because, among other reasons, the beneficiary of tort compensation, like the tortfeasor, is a private party. The notion of fault is least functional, however, when balancing the interests of a property holder against the interests

2. Section 316 of The Clean Streams Law enables the DER to order a property owner or occupier to correct a condition existing on his land which causes pollution or the danger of pollution.

> of a state in the exercise of its police power, because the beneficiary is not an individual but the community. As this Court stated in an analogous setting: 'The absence of facts supporting concepts of negligence, forseeability or unlawful conduct is not in the least fatal to a finding of the existence of a common law public nuisance.' *Barnes & Tucker I, supra* at 414, 319 A.2d at 883." Id. at f.n. 18

In sum, we find that Section 315 imposes upon appellant the responsibility to abate the acid mine discharge emanating from the deep coal mine which he owned and operated and that the liability is not diminished by the possibility that the outbreak of acid mine water might have been caused by the actions of third party intruders breaking down the closure seal.

Appellant, in his post-hearing brief suggests that the imposition of liability for the acid mine discharge upon him would be unduly oppressive. However there is nothing in this record to suggest such a result. The record is devoid of information on either the cost of abatement or the financial ability of appellant to undertake the cost of abatement. Further, this proceeding is determinative of only the legal duty of appellant. His financial situation has no effect on that duty. An inability to comply would be more appropriately raised as a defense to an enforcement action for noncompliance with an order. See *Ramey Borough v. DER*, 15 Pa. Commonwealth Ct. 601, 327 A.2d 647 (1974) aff'd 466 Pa. 45, 351 A.2d 613 (1975).

CONCLUSIONS OF LAW

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

2. The DER has the power and the duty to order abatement of illegal post-mining discharges of acid mine drainage.

3. Appellant is liable for the abatement of the acid mine drainage discharge from the Garretts Run Mine that he previously operated irregardless of the reason for the outbreak of acid mine drainage.

O R D E R

AND NOW, this 8th day of August , 1980, it is hereby ordered that the appeal of Adam Greece from the Department of Environmental Resources' Order dated August 28, 1979, requiring appellant to take certain steps to abate the acid mine discharge from the Garretts Run Mine is dismissed and the Department's Order is sustained.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

BY: THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: August 8, 1980

CONCURRING OPINION

By: Paul E. Waters, Chairman

I do not believe the *Barnes & Tucker* case, *supra*, decides the question of whether under all circumstances a former mine operator becomes an insurer for all future time. The facts of this case do not require that we decide it. I agree with the majority that it is inconceivable that a third-party would re-arrange the brick work as suggested by appellant. I therefore join the order dismissing the appeal.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MR. AND MRS. KEVIN ABRAHAM : Docket No. 79-170-B

: Water Obstructions Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and JOHN FARKUS, Permittee

ADJUDICATION

By: Thomas M. Burke, Member, August 26, 1980

Mr. and Mrs. Kevin Abraham have appealed the Department of Environmental Resources' (DER) issuance of a permit under the Water Obstructions Act, the Act of June 25, 1913, P.L. *as amended*, 32 P.S. 681 *et seq.* to John Farkus. The permit enabled Farkus to relocate a stream which borders the Abrahams' property and which is the receiving stream for the effluent from a sewage treatment plant recently constructed by the Abrahams.

John Farkus is granted intervenor status in this matter by the operation of board rule of procedure 25 Pa. Code 21.51(c) which subjects the recipients of permits, under appeal, to the jurisdiction of this board.

Two days of hearings were held on the appeal and appellants and intervenor Farkus filed post-hearing briefs. The DER chose not to file a post-hearing brief.

FINDINGS OF FACT

1. Appellants, Mr. and Mrs. Kevin Abraham, are individuals residing at R. D. #1, Box 247, Daisytown, PA 15427.

2. Appellee is the Department of Environmental Resources, the agency entrusted with the duty to administer and enforce the provisions of the Water Obstructions Act, the Act of June 25, 1913, P.L. *as amended*, 32 P.S. 681 *et seq.* and The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. 691.1 *et seq.*

3. Intervenor is John Farkus an individual residing at R. D. #1, Daisytown, PA 15427.

4. Appellants have owned since 1974 a tract of land in West Pike Run Township, Washington County, PA.

5. Appellants have subdivided their West Pike Run Township property for the purpose of development. The subdivision is called the "Abraham Plan of Lots" and has been approved by the West Pike Run Township Supervisors and the Washington County Planning Commission.

6. John Farkus owns a parcel of property in West Pike Run Township, Washington County adjacent to the Abraham parcel of property.

7. Appellants designed and constructed a sewage treatment plant to serve the Abraham Plan of Lots.

8. The DER issued two permits for the sewage treatment plant to West Pike Run Township: a sewage permit under The Clean Streams Law, *supra*, and a NPDES permit under the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*

9. Although the applications for the permits were submitted in the name of West Pike Run Township by McMillen Engineering Company, the work was paid for by appellants.

10. The Clean Streams Law permit, to construct the sewage treatment plant was issued to West Pike Run Township in April 1978. The NPDES permit, Permit No. 0090832, approving the discharge from the sewage treatment plant was issued in June 1979.

11. On August 16, 1979 John D. Farkus applied to the DER's Bureau of Dam Safety, Obstruction and Storm Water Management for a permit to relocate approximately 130 feet length of an unnamed tributary of Pike Run.

12. On September 27, 1969, the DER issued Permit No. 6379719 to John Farkus granting permission to Farkus to relocate 130 feet length of a tributary of Pike Run.

13. That section of the unnamed tributary of Pike Run for which Farkus received the relocation permit borders appellants' property, and includes the location of the discharge from the Abraham Plan of Lots sewage treatment plant.

14. The application for relocation permit submitted by Farkus did not state that the stream to be relocated borders appellants' property; nor did it state that there existed a dispute over the ownership of the land bordering the stream.

15. The application for relocation permit submitted by Farkus did not show that a discharge pipe from the sewage treatment plant existed in the area of the stream to be relocated.

DISCUSSION

Appellants, Mr. and Mrs. Kevin Abraham, have recently constructed a sewage treatment plant to serve a 10-lot subdivision they developed for single family residential housing in West Pike Run Township, Washington County. The

plant was approved by a Clean Streams permit issued by the DER.[1] The DER also issued a NPDES permit[2] approving the discharge of the effluent from the plant to an unnamed tributary of Pike Run, which flows generally along the western border of appellants' property. Unfortunately, for appellants, the DER also issued a permit to John Farkus, a neighboring property owner, to relocate the section of the stream where the plant's discharge is located. Appellants are now left with a sewage treatment plant without a discharge point, and a plan of lots without sewage service.

What has transpired here is a result of Farkus' objection to the construction of the sewage treatment plant and, to a lesser extent, a history of animosity between appellants and Farkus.[3] When Farkus became aware of appellants' application for the sewage treatment plant permits he sent two letters to the DER protesting their issuance. The thrust of Farkus' complaint was that he had not given permission for the discharge from the sewage treatment plant to the stream which he contends is on his property and also that the amount of effluent from the plant would make a swamp of his pasture since the stream is only a "dry gully" most of the time.

The DER responded to his protests by sending one of its engineers to inspect the plant site and the stream. DER followed the inspection with a letter which agreed with Farkus that "the receiving stream does not flow year-round" and, for that reason, assured Farkus that the sewage treatment plant would be

---

1. The permit was issued in the name of West Pike Run Township because of a policy of the DER to issue permits for construction of sewage treatment plants only to governmental bodies or holders of a PUC certificate. The reason for the policy is to assure the continued presence of a responsible operator.

2. The National Pollutant Discharge Elimination System Permit is required by the Federal Water Pollution Control Act.

3. Appellants reside on the subdivided parcel and Farkus has complained about their septic system malfunctioning. Appellants, in turn, have complained that Farkus has not kept his cows off their property and Farkus has rebuked Abraham for mowing the grass on property that Farkus believes he owns.

required to provide a "very high degree of treatment". The letter also informed Farkus that the sewage treatment plant permits had been issued.

Farkus, obviously not satisfied with the DER response, used his own ingenuity to keep the plant's effluent from the stream. He procured the services of earth-moving equipment from Mardulli and Sons, his employer, and had them fill in the section of the stream where the discharge pipe was located. Appellants, to their astonishment, discovered that the receiving stream had been moved some fifty feet from their discharge point.

Farkus' application for the permit to rechannel completely misrepresented the purpose of the stream relocation and ignored appellants' status as riparian property owners as well as appellants' use of the stream as a receiving stream for the plant's discharge. Farkus, in his application for the permit, said that the reason for relocation was to prevent the stream from eroding away fence posts that exists along, and in some places inside, the banks of the stream. Given the circumstances surrounding the stream relocation we find that reason to be short on credibility.

The principle dispute at the hearing was the location of the stream in relation to the boundary line separating the Abraham and Farkus properties, as Farkus argued that the stream is totally surrounded by his property and therefore he was correct in not naming Abraham as a riparian property owner in the application. The testimony established conclusively that at least at the location of the sewage treatment plant discharge, the stream borders the Abraham property. There is a locust tree post fence in the proximate area of the boundary between the two properties. Farkus argues that the fence is on the property line and Abraham contends that the fence is on his property. In the area of the plant discharge the fence posts are inside the banks of the stream and therefore, at least at that location, the stream's banks border the Abraham property under either theory of ownership.

25 Pa. Code 105.211 of the DER's regulations set forth the information required by an application for a permit for stream relocation. Subsection (a)(5) requires "a description of the purposes of the proposed channel change", subsection (a)(6) requires proof of title for all lands included in the site of the proposed channel change, and subsection (a)(2) requires a stream profile which shows existing obstructions. Since we have found that Farkus' application misrepresents the reason for the stream relocation, does not recognize appellants' reparian property ownership and does not show the treatment plant discharge, we reverse the DER's action of issuance of the permit and declare channel change Permit No. 6379719 to be null and void.

As a caveat, we wonder why the DER did not act on its own to rectify Abraham's predicament rather than allowing this matter to proceed to hearing. Although the DER was not provided with the correct information at the application stage, a cursory investigation after Abraham first complained, would have shown that the permit was wrongfully issued. Instead, DER took the position that the matter was strictly a property dispute, and it argued the same proposition to the board as a basis for dismissal. That position appears to be emminently unfair to the Abrahams; it leaves them without a remedy for an obvious wrong. We therefore reverse.

CONCLUSIONS OF LAW

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

2. A misrepresentation of the facts in a permit application is grounds for reversal of the issuance of the permit.

3. Noncompliance with the regulations governing the contents of a permit application is grounds for reversal of the issuance of the permit.

O R D E R

AND NOW, this 26th day of August, 1980, it is hereby ordered that the appeal of Mr. and Mrs. Kevin Abraham is sustained. The DER action of issuance of Permit No. 6379719 to John Farkus to allow the relocation of 130 feet of an unnamed tributary of Pike Run is reversed and Permit No. 6379719 is declared null and void.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Thomas M. Burke

BY: THOMAS M. BURKE
Member

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: August 26, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ANDORRA NURSERIES, INC. :

:

Docket No. 79-195-W

:

Pa. Sewage Facilities Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WHITEMARSH TOWNSHIP AUTHORITY,
WHITEMARSH TOWNSHIP, Permittee

and INA CONFERENCE FACILITIES, INC., Intervenor

ADJUDICATION

By: Paul E. Waters, Chairman, August 5, 1980

This matter comes before the Board as an appeal from the approval by DER of a proposed Act 537 sewage plan revision by Whitemarsh Township hereinafter "Township", and the issuance by DER of a Water Quality Management permit. Andorra Nuseries, Inc., hereinafter "Andorra" which owns a large tract of land in the township, prefers the construction of a gravity sewer line across its property rather than the sewer line proposed by Intervenor INA Facilities, Inc. INA, on the other hand, is constructing a large conference facility on a tract which adjoins appellant's land, and it has moved ahead with the plans which were approved by DER, despite the fact that there remain some unresolved sewage disposal problems in a nearby area known as "Cherrydale Drive" which could be better served by a new gravity sewer line crossing appellant's property. Although all

parties at one time seem to have agreed that all of the area sewage needs could be met by a gravity line crossing the Andorra tract, this agreement never took legal form and each party has now gone its separate way because of time, and other considerations.

FINDINGS OF FACT

1. Andorra Nurseries, Inc., Appellant, is the owner of a 146 acre tract of land in the Southeast section of Whitemarsh Township at which location it intends to construct a residential development.

2. INA Conference Facilities, Inc., (INA), Intervenor, is the owner of a tract of land in the Southeast section of Whitemarsh Township at which location it is developing a corporate conference facility known as Eagle Lodge.

3. In the Southeast section of Whitemarsh Township, immediately east of Ridge Avenue, is an area of residential development known as the "Cherrydale Drive" area.

4. Whitemarsh Township has been aware of Cherrydale Drive area sewerage problems since, at least, 1973.

5. In evaluating various alternatives for the provision of sewarge facilities, the DER considers the long range development of an area, prefers an alternative that represents a comprehensive program for wastewater collection, prefers an alternative that provides for the orderly development of sewerage facilities and provides a regional solution to meet the needs of a planning area.

6. Various alternatives for providing sewerage facilities for the Southeast section of Whitemarsh Township were considered; they include,

(a) The "Gravity Line Alternative" (Andorra, INA & Cherrydale Drive)

(b) The "Cherrydale Drive-INA Alternative"

(c) The "INA or Ridge Avenue Alternative"

6. The INA Alternative, serving solely INA, consists of a pump station to be located on INA's property which would first pump the INA sewage to an existing terminal manhole located on Ridge Avenue near Barren Hill Rd., where it would then flow to existing Pump Station #8 where it would be pumped once again to an existing sewer line located in the vicinity of Church Road and Ridge Avenue.

7. The Gravity Line Alternative is the least expensive to construct and the most direct method of conveying sewage for treatment to be generated in the Southeastern portion of Whitemarsh Township.

8. In March of 1979, Whitemarsh Township submitted to the Department of Environmental Resources an application to revise its Official Sewage Facilities Plan to provide for the INA Alternative. The DER approved the Revision, as evidenced by a letter to Whitemarsh Township dated November 29, 1979.

9. The Whitemarsh Township Authority submitted its application for permit No. 4679465 on October 18, 1979 to construct the INA Alternative. It was issued by DER on November 20, 1979.

10. On December 20, 1979, Andorra Nurseries, Inc. filed an appeal from DER's grant of Water Quality Management Permit No. 4679465 to the Whitemarsh Township Authority and the DERs' grant of the approval of the Revision to the Whitemarsh Township Official Sewage Facilities Plan.

11. Andorra Nurseries, Inc., on September 1, 1978, received approval of its preliminary plans for the development of its tract.

12. Water Quality Management Permit No. 4679465 does not contain Standard Condition 26 or a similar condition requiring INA's abandonment of such authorized facilities and participation in the regional Gravity Line Alternative when available.

13. Although considered because of time constraints, INA rejected a proposed system which would serve INA's facility and the Cherrydale Drive area in favor of a sewerage system serving INA alone.

14. The township, INA and Andorra held discussions in February and March, 1979 regarding the possibility of a gravity line sewer system.

15. After preliminary negotiations, when INA drafted a proposed agreement to be signed by Andorra Nurseries, it unilaterally added a requirement for a personal guarantee by the President of Andorra Nurseries, Inc., it imposed restrictions on the number of dwellings Andorra Nurseries could construct annually, and required Andorra Nurseries to complete the construction of the Gravity Line Alternative within a certain period of time.

16. Andorra's principal, Mr. Kravitz, rejected this proposed agreement, first on March 5, 1979, and again on March 21, 1979, and advised INA to pursue other alternatives available to it.

17. Andorra did not seek to reopen discussions with INA regarding a gravity line sewer until August 9, 1979 after INA had pursued another alternative.

18. In the fall of 1979, Andorra had three different plans for developing the Andorra tract, including a traditional subdivision plan for single family homes, a cluster development plan, and a townhouse plan.

19. In the course of DER's evaluation of the Township's application, DER considered, *inter alia*, the timing of the projects, the alternatives available, the wishes of the township, and the length of sewer line necessary to carry out other alternatives.

20. The township advised DER that any gravity line sewer including Andorra was speculative as of September 28, 1979.

21. The township, DER and the Montgomery County Planning Commission all expressed interest in the gravity line alternative because they believed it would provide sewer service for INA, Cherrydale, and Andorra.

22. There is nothing in the approved Ridge Avenue connection that prevents the later sewering of Cherrydale Drive and Andorra by means of a gravity line sewer.

23. In terms of sewering Andorra and Cherrydale Drive, it makes no difference whether INA, at the top of the gravity line, lifts its effluent to Ridge Avenue or participates in a gravity system.

24. There is no reason to believe that INA is or will be unable to maintain and operate its private pump station and sewer line.

DISCUSSION

At the outset there appeared to be a sewage disposal problem about which three parties had a concern, and generally agreed upon a solution, which was too good to be true. And indeed, as things turned out, it was. Whitemarsh Township was concerned about a developing sewage problem in an area known as Cherrydale Dr.[1] and when INA indicated the need for a sewer line to serve a proposed new conference facility,[2] the township indicated that the best solution would be a gravity line crossing which would also serve, a portion of Andorra's 166 acre tract. A meeting was held on February 12, 1979 in an effort to work out the details of such a solution but it soon became apparent that the parties had distinct and unrelated agendas. INA was anxious to proceed with construction of its new building and although Andorra did have future plans for a housing development on its large tract, the exact nature and specifics were not yet finalized. It was at this time that we believe the turning point came.

On March 5, 1979, Andorra wrote to INA responding to a proposed

---

1. About 25 homes in this section of the township were, and presumably are, experiencing sewage overflows and related septic tank problems.

2. The Conference Center is located on a 43.5 acre parcel zoned for the intended use and bounded by Barren Hill Rd. and Harts Lane.

written agreement which had been prepared by INA based on the February 12th meeting.[3] Andorra contends, and we agree, that the draft agreement which was submitted by INA was clearly outside of the discussions which served as its basis.[4] Incensed by this departure Andorra wrote INA[5] and stated: *inter alia* "That you may not be delayed in your project I suggest that you explore the other alternatives available to you". INA only then embarked irrevocably on this sewer line project serving its facility by way of Ridge Avenue using pump stations.

Appellant concedes, as it must, that it bears the burden of proof in this matter.[6] It has alleged that DER abused its discretion in issuing a Water Quality Management permit[7] to INA for construction of a 2600 foot sewer line across its [INA] property to connect with an existing line at Ridge Avenue in Whitemarsh Township for treatment at a municipal plant.[8] This route will

---

3. The meeting was attended by the Township Solicitior, Counsel for Andorra, two lawyers for INA, the Township Manager and engineers. Mr. Kravitz, owner of Andorra, participated by a telephone hook-up.

4. INA not only inserted provisions for bonding of the project at 110% of costs, but also required Mr. Kravitz, with no suggestion of insolvency, to personally obligate himself as well as the corporation which was actually the party.

5. The letter in pertinent part said: "Enclosed herewith find unexecuted sewer agreement prepared by you which was forwarded to us by our attorney Mr. Edward J. Hughes, Esquire. This proposal cannot be considered either by Andorra Nurseries or by Harry Kravitz as an individual. That you may not be delayed in your project I suggest that you explore the other alternatives available to you. This letter is being sent directly to you that you may not be delayed."

6. 25 Pa. Code 21.101 on Burden of Proof provides in pertinent part: "(c) A party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board:
(1) Refusal to grant, issue or reissue any license or permit.

(2) Refusal to grant any variance from any regulation dealing with air quality standards.

(3) When a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation."

7. No. 4679465

8. The treatment plant is actually owned by the Whitemarsh Township Authority and only 585 feet of sewer are off INA property and will be dedicated.

require the use of pump stations inasmuch as Ridge Avenue is at a higher elevation than the INA tract. The major factual reason relied upon by appellant Andorra Nurseries, Inc., in this appeal is that a small section of the township along Cherrydale Dr., is experiencing septic tank problems and this area could easily be sewered by a gravity line[9] extending across Andorra's property for approximately 3,600 feet.[10] There are actually two proposals for a gravity sewer line. One was originally contemplated by the township to serve INA, Andorra and Cherrydale Dr. and when this was not feasible, Andorra made a proposal to allow INA a free easement to construct a sewer line that would benefit INA and Cherrydale Dr. only. Andorra proposes at some future time, to construct its own lines to serve a housing development now in the planning stage. The second gravity line or "free easement" proposal actually never became specific and in any event came too late for INA, which embarked, in accordance with the permit here at issue, on a sewer line to meet only its needs.

The major reason appellant urges this Board to find an abuse of discretion by DER relates to the question of a comprehensive water quality management program. The Penna. Sewage Facilities Act,[11] Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.* 35 P.S. §750.5 (d)(2) requires official plans to:

"Provide for the orderly extension of community interceptor sewers

---

9. The township made the original proposal for all parties to use a gravity line, but various efforts to accomplish this, ended without agreement between Andorra and INA.

10. This would still require a line on INA property of about 2,000 feet.

11. Department Regulations also indicate at 25 Pa. Code 71.16(e) (3) that DER, in approving or disapproving an official Act 537 plan or revision determine—"whether the plan or revision is consistent with a comprehensive program of water quality management in the watershed as a whole—".

> in a manner consistent with the comprehensive plans and needs of the whole area—".

The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* 35 P.S. 691.4 (5) in the same vein, provides:

> "The achievement of the objective herein set forth requires a comprehensive program of watershed management and control."

Appellant's argument, on the facts of this case will not stand up under close scrutiny. First of all, INA's Ridge Avenue sewer connection will ultimately route the sewage to the very same plant with a discharge in the very same place as if Andorra's gravity line were constructed. There just does not factually appear to be any water quality difference inherent in the route chosen. If it is suggested that the Cherrydale Dr. problems and future Andorra sewer needs will not be met and therefore the INA plan is not "comprehensive", again we must look at the actual facts. Andorra does not intend to utilize the sewer line which it would allow INA to construct by grant of a "free easement". This line would run along a stream bed, and Andorra intends to construct its own separate lines when the time comes.[12] It is not persuasive for Andorra to argue that INA's sewer project is not "comprehensive" for failing to consider it or Cherrydale Dr. when it proposes to install a similar line in any event, which can just as easily serve both purposes. For Andorra to now complain because INA looked at another alternative so as not to delay its project, after Andorra urged it to do precisely this,[13] does not seem altogether fitting and proper. Although INA has not raised the question of *estoppel in pais*, and we will not do so *sua sponte*, there

---

12. Andorra was not ready to begin housing construction when INA was in its final decision making phase; this at least in part appears to be the reason the parties could not reach an agreement.

13. See footnote 5 *Supra*.

can be no doubt that INA acted upon the suggestion and now is asked to face consequences for that action.[14] If the township had insisted upon its original plan, i.e. a gravity line to serve Andorra, INA and Cherrydale Dr., we would now be faced with a more difficult decision. But, in fact the township, which took no active part in these proceedings, was satisfied to have INA move ahead with its conference facility project with a Ridge Avenue connection when it was convinced that Andorra was not ready or able to move ahead on its housing development.[15] DER had all of this information before it reached a decision to grant the permit here under attack. It must be remembered that DER did not have three proposals before it, as we have assumed for purposes of this discussion. In point of fact, there was only one sewer proposal, the INA separate line, and DER allowed this to proceed only after seeking further information which indicated that no

---

14. *Estoppel in pais* prevents a person from changing his position to the prejudice of another who properly relied upon the former position taken. *Sunseri v. Sunseri* 55 A.2d 370 P.L. E. Estoppel d21. Although INA submitted a one sided proposal to Andorra, this does not alter the fact that Andorra urged INA to do exactly what it subsequently did.

15. On September 28, 1979 the township wrote to DER responding to a request for clarification regarding the various sewer proposals:

"It was hoped that with the cooperation of Andorra Nurseries, Inc., the development would be serviced by a gravity line rather than a force main to Ridge Pike. A draft agreement for the joint construction of a collector line with Andorra Nurseries was prepared, but rejected by Andorra Nurseries in March 1979 for several reasons, including the fact that final subdivision approval was not forthcoming for their property. It was immediately after this impasse that INA requested that the township submit the subject Planning Module for Land Development to DER for processing."

"The township submitted the Module as a supplement to our then current 537 Plan. The township took this position as Andorra Nurseries had not submitted final subdivision plans for their property nor were there any prospects of such a submission at that time. The township does not feel that it is in a position to impede development on one property based on unfounded assurances by the other property owner that they will be installing a sewer line which has approval neither from the township nor DER. The township would not object to an eventual tie in to a future gravity line. The gravity line on the Andorra Nurseries property, however, can only be described as speculative at this time."

other "more comprehensive" project was then possible.[16] We find no abuse of discretion. *Township of Heidelberg, et al. v. DER, et al.* No. 76-150-D (issued October 21, 1977), *Bedford Springs Hotel v. DER, et al.* No. 76-055-W (issued October 28, 1977).

Appellant raises the Constitutional issue of Article I section 27,[17] as interpreted in *Payne v. Kassab* 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973, aff'd 468 Pa. 226 (1976)) but fails to indicate in any detail beyond the previous discussion, wherein the shortcomings lie. The first of the *Payne* standards requires compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources. We have found no such violations. The second question we must consider under *Payne* is whether the record demonstrates a reasonable effort to reduce the environmental incursion to a minimum. The environmental incursions are at so low a level as to be almost non-existent, in terms of final results, because the same treatment plant will be used as is presently in use. There will be new pump stations and cost is the very best incentive to keep these to a minimum. The *Payne* standard requires us to balance the environmental impact and benefits. The impact of the sewer line and the resulting effluent will be negligible, while the social and economic benefits of a large well planned new conference and training facility will be of significant benefit to the entire area in both esthetic and commerical terms. In short, there has been compliance with, and no violation of, Article I section 27 of our Constitution.

Finally, Andorra argues that DER should have included Standard Condition 26 in the Water Quality Management Permit, requiring INA to hook into

---

16. INA argues in this regard that DER would have abused its discretion if it had refused the INA project based on the hope of a future Andorra gravity line sewer project. INA would then see itself as being held hostage to the speculative future development of Andorra.

17. Article I Sec. 27 Pa. Constitution: "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."

a gravity line sewer when constructed in the future. Apparently, the township did consider imposing such a condition, but decided that the Andorra gravity line was, as of September, 1979, "speculative" and it did not feel that it should recommend to DER a future mandatory tie-in. Instead the township merely suggested this as a future possibility and DER adopted this view. Andorra now urges us to not only amend the permit to require a mandatory tie-in, but also to order INA to help pay[18] for this other sewer line, presumably as a penalty for its previous misconduct. Having found no such misconduct, we decline.

CONCLUSIONS OF LAW

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

2. DER did not abuse its discretion in issuing a Water Quality Management Permit to INA for the purpose of constructing a sewer line with pump stations, connecting at Ridge Avenue in Whitemarsh Township.

3. DER did not violate the Penna. Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq.* or any regulation of DER in issuing said permit.

4. There has been no violation of Article 1 section 27 of the Pennsylvania Constitution as enunciated in *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973) in this matter.

---

18. INA has already made a $51,000 contribution to the township to be used in solving the Cherrydale Dr. or other future sewage disposal problems.

ORDER

AND NOW, this 5th day of August, 1980, the appeal of Andorra Nurseries, Inc., to No. 79-195-W is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: August 5, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LEHIGH DYEING AND FINISHING, INC. : Docket No. 79-058-W

: Air Pollution-Odor
: 25 Pa. Code 123.31(b)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

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

By: Paul E. Waters, Chairman, August 26, 1980

This matter comes before the board as an appeal from an order issued by DER April 27, 1979 requiring Lehigh Dyeing and Finishing, Inc., hereinafter appellant, to use certain emission control equipment on its dyeing vessels, to take other indicated steps and to cease and desist any operation not in compliance, until approved devices were installed. The action grows out of a number of complaints received over a period of years regarding odors allegedly coming from a chemical (Cadra) used in the plant process. Appellant has taken steps to abate the problem and while it seriously questions the severity, feels, in any event, that it has done everything reasonably required to satisfy its neighbors and DER.

FINDINGS OF FACT

1. Lehigh Dyeing and Finishing, Inc. is a company incorporated in Pennsylvania, with its registered office at Cedar and Meadow Streets, Allentown,

Pennsylvania 18105. At its registered corporated address, Lehigh operates a textile dyeing and finishing business.

2. At its plant, Lehigh operates 15 full-size atmospheric dyeing vessels and one very small "sample" vessel, in all of which various textiles are dyed through the use of dyes and chemical dye carriers.

3. Dye carriers are chemicals which allow molecules of dye to enter certain fibers more easily than they would without the carrier.

4. Chemical dye carriers are ordinarily used only in dyeing polyester and poly-cotton fabrics.

5. The only chemical dye carrier used at Lehigh is Cadra-OL12P (Cadra).

6. An atmospheric dyeing vessel does not operate as a closed system; that is, the vessels open to the outdoor atmosphere through roof vents. Heat is applied to the vessels, and as the fabric is boiled in the dye bath the gaseous by-products are vented to the outdoor atmosphere.

7. When Cadra is used in the dyeing process in an atmospheric dyeing vessel with no air pollution control equipment attached to the exhaust, a portion of the Cadra, in gaseous form, is gradually dissipated to the outdoor atmosphere.

8. The Lehigh plant is surrounded on three sides, north, west, and south, by a neighborhood of Allentown which is primarily residential in nature.

9. Beginning at least as early as the spring of 1977, residents of the neighborhood around the Lehigh plant perceived in the outdoor atmosphere an odor which was most often described as "sweet" or "chemical".

10. The neighborhood residents noticed the odor quite frequently, sometimes as often as two or three working days in every week. Occasionally the residents did not perceive the odor for a period of two or three weeks at a tim

11. The existence, duration and strength of the odor varied with wind direction and other weather conditions, but it was strong for at least half of the time when it occurred.

12. When Mr. Frank Fischl, now the Mayor of Allentown, attended a neighborhood meeting in the summer of 1977, at a location one block away from the Lehigh plant, the sweet "dyehouse" odor was so strong that the windows of the meeting hall had to be closed, even though it was a very hot evening.

13. In September, 1977, DER notified officers of Lehigh that the emissions of malodorous air contaminants from the plant were in violation of Section 123.31(b) of the Rules and Regulations of DER, and requested that company officials meet with DER representatives to discuss methods of controlling the malodorous emissions.

14. A Plan Approval Application (numbered 39-399-0014) received in May 1978 by the DER Reading Regional Office proposed the installation of charcoal filters on the exhausts of only eight of the fifteen dye vessels.

15. Upon discovering that Lehigh proposed to control only half of its dyehouse exhausts, DER did not deny the plan approval application and insist on controls on all the exhausts, because DER officials thought at that time that such partial controls, coupled with the reduction in Cadra use, might possibly result in sufficient odor control to bring about compliance with the regulation.

16. On July 13, 1978, DER issued a plan approval to Lehigh to install charcoal filters on the exhausts from eight of the fifteen dye vessels.

17. Lehigh installed the approved air cleaning devices on the exhausts of eight dye vessels by November 15, 1978.

18. Of the fifteen major dyeing vessels at the plant, thirteen have very large capacities, from 650 lbs. to 1000 lbs; the remaining two have capacities of only 100 lbs. each.

19. Of the thirteen large-capacity dye vessels, controls were installed on only six, with a total capacity of 5250 lbs. Seven vessels, with a total capacity of 6750 lbs., remain uncontrolled.

20. During the late winter and early spring of 1979, DER investigated several complaints from citizens of strong malodors emanating from Lehigh.

21. During the early spring of 1979, DER employees performed inspections of the plant and the neighborhood, and confirmed that a strong "dyehouse" odor, which they recognized as the same odor which had existed before the installation of control equipment, was still present in the neighborhood of the Lehigh plant.

22. The DER officials could not positively determine the exact source of these odors within the Lehigh plant, or whether the control equipment was operating properly, since the company was operating the controlled and uncontrolled vessels simultaneously, and was using dye carrier in both types of machines simultaneously.

23. The Department withheld issuance of an operating permit to Lehigh due to the continued complaints from neighboring residents and the results of DER's own inspections, both of which revealed a need to further evaluate Lehigh's odor emissions control methods.

24. Based on the citizen complaints and their own inspections, it was the opinion of the DER officials assigned to the case that by mid-April, 1979, Lehigh had not brought its odor emissions into compliance with the Rules and Regulations of the Department.

25. As a result, DER on April 27, 1979, issued to Lehigh the Order which is the subject of this appeal, requiring Lehigh to:

> "A. ... operate its atmospheric dyeing vessels... in a manner that does not cause air pollution.

B. ... take any and all steps necessary to insure that compliance with paragraph A... is achieved and maintained. Such steps shall include, but not be limited to, the following measures:

(1) maximize the use of those eight atmospheric dyeing vessels which are vented to the activated charcoal adsorber system.

(2) Limit the use of the remaining seven... vessels to periods when all the vessels in paragraph B(1) above are in use.

(3) Reduce to the extent necessary, or eliminate, the use of chemical dye carriers in... vessels which are vented directly to the atmosphere...

(4) Reduce to the extent necessary the use of chemical dye carriers in vessels which are vented to the air cleaning device...

(5) Provide adequate maintenance of the activated charcoal system...

C. ... maintain records of usage of all atmospheric dyeing vessels...for inspection by the Department... These records shall at least include the following information:

(1) Dye vessel number and date and time of use per batch,

(2) Quantity and name of chemical dye carrying agents employed per batch,

(3) Time and length of boil cycle per batch.

D. ... cease and desist the operation of any equipment which cannot be operated in a manner to assure compliance with paragraph A... until such time as approved air cleaning devices are installed."

26. From April 30, 1979 to June 14, 1979, 50.7% of the Cadra used was in uncontrolled vessels, and 49.3% in controlled vessels.

27. Company officials testified at the hearing in this case that to eliminate the use of Cadra in controlled vessels, as required by paragraph B(3) of the Order, is economically impossible for the company.

28. During 1979, including the period after the issuance of the Order, DER's Bethlehem office received 40 complaints by telephone concerning odors emanating from the Lehigh plant.

29. Several area residents testified at the hearing in this matter that throughout 1979 the same odor that they first perceived as long ago as 1976 or 1977 continued relatively undiminished in strength and frequency of occurrence.

30. From the period 1977 to 1979, the company installed pollution control equipment on eight of the atmospheric dyeing vessels at a cost of approximately $56,000.00, which monies came out of the operating revenues of Lehigh.

31. The cost to install pollution control on the remaining seven atmospheric dyeing vessels at Lehigh, such equipment being similar to the pollution control equipment already installed, would be approximately $65,000.00, and another $15,000.00 of expense would be incurred for annual maintenance for the additional pollution control equipment on the remaining dyeing vessels.

32. Further, as a result of having to install pollution control equipment throughout the plant, Lehigh has been directed by its insurance carrier to install a water deluge system at a cost of some $65,000.00 to $70,000.00.

33. There are other odors in the neighborhood surrounding Lehigh and there are a number of other industries whose operations are odor-producing.

34. Lehigh conducts its dyeing operations on the weekdays, Monday, Tuesday, Wednesday, and Thursday, 24 hours per day.

35. Instead of reducing carrier use by one-third in the plant, Lehigh went on to cut the use of the carrier, Cadra-OL, in the dyehouse formulations by up to 50%.

36. The production schedules are such at Lehigh that there are times when carrier has to be used in dyeing vessels not having filters on them, and the Department has long been aware of this.

37. Lehigh, after installing the filter equipment, purchased two complete sets of carbon filters for use in the pollution control system, together with a few spare filters to have on hand. The filters are changed on a weekly basis and the used filters are cleaned at the plant, in conjunction with other air pollution control equipment previously installed at Lehigh.

38. After dye carrier is introduced into the dyeing vessels, it dissipates within a period of an hour and one-half to a maximum of two hours.

39. Of the approximately forty complaints made in 1979, 60% of these complaints were made by four people.

40. In a number of cases in the 1979 survey, the Department personnel did not personally contact participants for the survey; rather, survey forms were given out to certain people in the neighborhood to give to other people who wished to participate in the survey.

41. The Department states that it cannot, and has never, given Lehigh any standard of measurement by which Lehigh can determine whether or not it is in compliance with Department regulations.

42. Area residents consistently testified at the hearing that through 1979, the same odors that they first perceived in 1977 has continued undiminished in strength and frequency, and, in fact, many testified that the odors have gotten worse, notwithstanding the fact that the company has installed filter equipment and has substantially reduced carrier usage in the plant.

43. An impartial observer hired by the company to visit the plant at various times of the day, and in different types of weather, reported that out of fourteen visits to the plant during a period of several months, that on only

one occasion could he perceive an odor which he thought might be coming from Lehigh.

44. On Friday, May 25, 1979, the dyeing function of the plant was shut down and there were two complaints in the morning, although no carrier had been introduced into the dyeing operation for almost twelve hours prior to those complaints.

DISCUSSION

This matter has had a long and interesting history. Although a dyeing and finishing operation has been carried on at the plant, now operated by appellant,[1] since 1961 apparently there were no objections raised concerning offensive odors until sometime in 1977. After an investigation was conducted by DER in response to these complaints, meetings were held with plant representatives to find a solution to the problem. Although appellant denied on the one hand that it was responsible for any offensive odor observed in the community, on the other, it acknowledged that the offending chemical must be one used in the dyeing process, known as "Cadra".[2] In fact, appellant's own expert was instrumental in developing methods designed to reduce the offensive nature of plant emissions to the atmosphere.[3] To make a very long story short, odor complaints continued and on April 27, 1979 DER finally ordered certain additional control measures to be taken after eight of fifteen dye vessels had already been connected to an activated charcoal absorption system. The order is not a model of clarity. It requires that appellant

---

1. Penn State Mills, a predecessor of Lehigh, operated a similar dyeing operation since the 1940's at the same plant.

2. This chemical, is used only on certain fabrics, as a carrier and makes the dye work better. It is known variously as "Cadra-OL" and Cadra-OL12P".

3. The amount of dye the carrier, Cadra, was reduced between 1/3 and 1/2 of the former amount used, and eight of fifteen dye vessels had their emissions controlled by a charcoal filter before venting through the roof.

comply with the law, keep certain records and to "cease and desist the operation of any equipment which cannot be operated in a manner to assure compliance with paragraph A...until such time as approved air cleaning devices are installed."

DER has issued this order pursuant to the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4006, and 25 Pa. Code §127.31(b). It is clear under our rules, that DER has the burden of proof in this matter.[4] The regulation of which a violation is alleged, provides:

> "No person shall cause, suffer or permit the emission into the outdoor atmosphere of any malodorous air contaminants from any source, whatsoever...in such a manner that the malodors are detectable beyond the property of the person."
> 25 Pa. Code §123.31(b)

In addition, the Code defines "malodor" to be:

> "Any odor which causes annoyance or discomfort to the public and which the Department determines to be objectionable to the public."
> 25 Pa. Code §121.1

We are presented with two questions. The first is an easy one. Did appellant permit the emission of an odor, detectable beyond its property, which caused discomfort and which was determined by DER to be objectionable to the public? There can be no doubt that the answer to this question must be "yes". This board would have to ignore too many credible witnesses, including the Mayor of Allen-

---

4. 25 Pa. Code §21.101

> "(b) The Department shall have the burden of proof in the following cases:
> (1) When it files a complaint for a civil penalty.
> (2) When it has revoked a license or permit for cause.
> (3) When it orders a party to take affirmative action to abate air or water pollution; or any other condition or nuisance, except as otherwise provided in this rule.

town, in order to reach a contrary conclusion. There were also a number of witness called on behalf of appellant, whom this board believes, were not bothered by any odor from the Lehigh Dyeing plant.[5] Because they did not detect, or if they detected, were not annoyed or discomforted, by it, does not lead unalterably to the conclusion that therefore no such odor exists. We believe however, that there are times, depending in part on weather conditions and activity at the plant, when it does indeed exist.

The second question, what can and should be done about it, is much more difficult. DER has issued an order which seems to require that appellant limit their use of uncontrolled vessels and reduce or eliminate the use of Cadra. The appellant need cease and desist operating only such equipment as cannot be operated in a manner that does not cause air pollution. Appellant has suggested that the vagueness of its responsibility under the statute and regulation is itself sufficient reason to dismiss the order. Recognizing that the order may have left something to be desired in the way of specificity, DER has now asked the board at this stage to amend the order by requiring appellant to install activated charcoal absorption equipment on the remaining uncontrolled exhausts of its dyehouse.[6]

---

5. We are, of course, aware that some of these witnesses were in a position where they could literally smell their way out of a job, by giving adverse testimony.

6. At pages 37 and 39 of its post-hearing brief DER states:

> "For the reasons stated above, it is apparent that if the Board simply upholds the Order as issued, it will not accomplish the desired goal of obtaining compliance of Lehigh's dyehouse with Section 123.31(b).
>
> Although the Board's remedy in such a situation would ordinarily be to remand the matter to DER for issuance of a modified order, such a solution would likewise not accomplish the desired goal, for several reasons.
>
> * * * * * * * * * * * * *
>
> The Board should therefore find that compliance of the malodorous emissions of Lehigh's dyehouse cannot be accomplished through the combination of controls and process changes contemplated by the DER Order of April 27, 1979, and employed heretofore; and should modify that Order to compel Lehigh Dyeing and Finishing, Inc., to install activated charcoal absorption equipment on the remaining uncontrolled exhausts of its dyehouse."

For its part, appellant would have us direct the parties to submit suggestions for a further survey and analysis of the odor. In addition it asks that a representative group of citizens in the area become involved in this, along with the use by DER of available scientific instruments.[7]

One matter of major concern to this board, is that we not require a *useless* expenditure of funds[8] in an effort to solve the odor problem which we have found does exist in the area of the Lehigh Dyeing and Finishing, Inc. plant.[9] We cannot help but sympathize with appellant's expert witness responsible for the plant dye operation. He was asked on cross-examination:

> "Q How do you explain the fact that on that June 6, when you said that there were — you pointed out that there were a lot of complaints that morning, but you were using all controlled machines at that point.
>
> A Correct.
>
> Q How do you explain the fact that Mr. Mordosky notes on his survey chart that he himself went out that morning and found an objectionable odor?
>
> A I find it as confusing as I do the days that we were not running and we had complaints. There is no logical — or any way that I can correlate these two things together.
>
> I know that these filter devices are functioning and functioning properly and quite successfully.
>
> Q I am not challenging that.

---

7. No doubt appellant refers to the use of a chromatograph/mass spectrometer which DER considered and rejected as not feasible as a method to measure and determine the origin of the odor.

8. See *Bethlehem Steel Corporation v. Commonwealth, Department of Environmental Resources*, 37 Pa. Commonwealth Ct. 479, 390 A.2d 1383 (1978).

9. Appellant argues that the economic impact of DER's order should be considered in this case. We agree this is one of many considerations of which DER and this board should be aware. Appellant will be required to spend $65,000 to install pollution control equipment on the remaining seven atmospheric dyeing vessels and another $15,000 for annual maintenance. *Bortz Coal Company v. DER*, 2 Pa. Commonwealth 441 (1971).

A Okay. I am totally confused. Also, since the Commonwealth feels that we should place the other machines and cover them with the same type of filtration, again, I am concerned and confused.

Q Isn't it possible that if the weather was as cloudy and rainy, as I believe you said it was, that the odors were lingering in the area from the evening before when you said that you introduced dye carrier at around 11:00 p.m.?

A I would find that very hard to believe.

Q It is possible, isn't it?

A No, I don't believe so."

After a review of all of the conflicting evidence, and after resolving those conflicts which can be resolved based on credibility, we are still left with a nagging uncertainty that installation of activated charcoal filters on the remaining uncontrolled exhausts will resolve the malodor problem. It is this lack of persuasion which leads us to conclude that DER has not fully carried its burden of proof so as to justify the requested amendment to the order of April 27, 1979 by this board on the present record. By the same token, DER itself has acknowledged the inadequacy of the present order now before us on appeal. It is our view that it would be a disservice to all parties if we simply upheld the order and dismissed the appeal, which we could easily do on the present record. We believe the ends of justice and fairness would best be served, by remanding this matter to DER with an order that appellant take further steps in an effort to determine how the odor problem can best be solved. This matter has dragged on much too long, and we will therefore require that the further steps to control the odor being emitted, be started within ninety (90) days, and be conducted for thirty (30) days. We shall require the operation of only the eight controlled dye vessels for the indicated thirty (30) day period, during which time DER shall monitor the area and prepare a report on the effect of operating only controlled vessels, to which appellant may respond for the board's further review.

CONCLUSIONS OF LAW

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

2. DER has the burden of proof in this matter, and has shown by a preponderance of the evidence that there is a violation of regulation 25 Pa. Code 123.31(b) but has failed to justify an amended order requiring appellant to immediately install control devices on all of the atmospheric dye vessels.

3. Where there is a need to take further action to control odor pursuant to 25 Pa. Code 123.31(b) and the exact steps that will accomplish this, are not clearly outlined by DER in an order issued to appellant, the matter will be remanded to DER for further action.

O R D E R

AND NOW, this 26th day of August, 1980, the above matter at No. 79-058-W is hereby remanded to DER with instructions to order Lehigh Dyeing and Finishing, Inc. to operate only those eight dye vessels which are controlled by activated charcoal filters for thirty (30) days. During said period DER shall operate an area monitoring program which will enable it to determine what if any changes occur in the area with regard to any objectionable odor which causes annoyance or discomfort to the public. Said program is to begin within ninety (90) days from the date hereof and a written report of findings together

with any response of appellant Lehigh shall be submitted to the board for further action as soon as it may reasonably be done thereafter.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

BY: PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: August 26, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WAYNE J. BUSFIELD, et al. :

:

Docket No. 77-128-W

:

Solid Waste Management Act

v. : 25 Pa. Code 75.32

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GEORGE KUEHNLE, Permittee
and the CITY OF PHILADELPHIA, Intervenor

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

By: Paul E. Waters, Chairman, September 26, 1980

This matter comes before the Board as an appeal from the grant of a solid waste management permit to allow the application of sewage sludge, from a Philadelphia treatment plant, on agricultural land in Bedminister Township, Bucks County, owned by one George Kuehnle, permittee herein.

DER had developed interim guidelines for issuance of permits such as the one here at issue, prior to promulgation of Rules and Regulations covering the agricultural use of sludge. The procedure is not new in Pennsylvania, but is still in a state of development and the many uncertainties have fueled the fears of appellant Busfield and other adjoining neighbors in Bedminister Township, as well as the Township itself, all of whom join this appeal. The questions and objections raised, concern the actual boundaries of the

permitted area, as well as soil and geological limitations which are alleged to make the site unsuitable for the disposal of sludge. In addition, appellants believe that DER should have required the permittee to obtain a Clean Streams Law permit, and they question the ability of DER to properly enforce permit conditions.

BACKGROUND

In 1975 it became clear to the City of Philadelphia that it would have to find alternative methods of sewage sludge disposal, since the Environmental Protection Agency (EPA) indicated that ocean dumping of sludge (the disposal method then used by the City) would have to cease by 1981. There are a number of agricultural and non-agricultural uses to which sludge can be put. There are 18,000 sewage treatment plants in the United States, producing 5 million dry tons of sludge annually. This is presently disposed of by (a) landfilling 25%, (b) ocean dumping 15%, (c) incineration 35%, and (d) land application 25%. Land application is presently in use at a rate of (1,250,000 dry tons) in Chicago, Denver, Fort Worth, Boise, San Diego and San Francisco as well as many smaller cities. In Wisconsin, 70% of their sludge is applied to land for agricultural purposes. In Pennsylvania, agricultural use is made of sludge in many municipalities, including Allentown, Birdsboro, Mt. Penn and Exeter Township.

Philadelphia produces about 70,000 dry tons of sludge per year and it is planned that less than half of this will go to agricultural programs, the rest will be disposed of by a mix of various other alternatives including strip mine reclamation. Only sludge coming from the southwest treatment plant of the City will be used at the Kuehnle site. The sludge from this plant has had treatment of a higher grade and meets the federal guidelines of EPA, which are not as strict as those of DER. The EPA guidelines include lifetime loading

limitations established for five metals: cadmium, lead, zinc, copper and nickel which are based on a cat ion exchange (i.e. soil absorption rate) of between 5 and 15. The Kuehnle property, under EPA guidelines, for example, would have a numerical limit for cadmium of nine (9) pounds per acre. Under DER guidelines, it is only three (3) pounds per acre.

Appeals were filed by the Township of Bedminister and twenty-six resident citizens after DER granted the permit for agricultural application of sludge to George Kuehnle. A petition for supersedeas was requested by appellants but was denied on December 6, 1977 after hearing, with the condition that a comprehensive monitoring program begin at the site.

A number of issues raised in the original appeals were waived by appellants at the conclusion of the hearing. These include such matters as milk and beef contamination and genetic damage allegations.

The guidelines require that the rate of sludge spreading in each year be controlled by three factors: the nitrogen content, the metal content and/or the exotic fraction (e.g. PCB 15, pesticides, etc). The permit issued in this case does consider these items by setting the spreading rate at 4.7 dry tons per acre. This, along with the dry soil condition is one of the most important factors in determining the eventual success or failure of the agricultural sludge program.

FINDINGS OF FACT

1. Appellants are Wayne J. Busfield and other citizens of Bedminister Township, Bucks County Pa., and Bedminister Township.

2. Appellee is the Department of Environmental Resources which is charged with the responsibility to administer the Solid Waste

Management Act, Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §6001, *et seq.* and the regulations and guidelines promulgated pursuant thereto.

3. Permittee is George Kuehnle, the owner of a 90-acre farm in Bedminister Township, a portion of which is the permitted area for the application of sewage sludge for agricultural utilization.

4. Intervenor, City of Philadelphia, is the governmental entity which generates the sludge which will be disposed of under a contract arrangement with permittee and Bio-Chemical Products, Inc.

5. Penn type soils predominate on the site and are suitable for the application of liquid sludge for agricultural purposes.

6. The slope of the application area does not exceed the 12% limitation contained in the Guidelines.

7. The dimensions of the application area as described in exhibit K-43 ensure that sludge will not be applied within 100 feet of a stream, 300 feet of water supplies, 50 feet of property lines or 300 feet of an occupied dwelling.

8. The permitted application rate of 4.7 dry tons per acre per year will not result in water pollution runoff, vector or odor problems.

9. The sludge to be applied to the application area is suitable for agricultural application.

10. The application rate as determined by DER is to be 4.7 dry tons per acre and is in conformity with the Guidelines based on nitrogen and other limiting factors.

11. Soils in the application area have a depth of 20 inches or more to bedrock.

12. The soil compaction caused by the application vehicle will not harm the land in the application area.

13. The Guidelines and the current regulations governing the agricultural application of sludge are based on an exhaustive analysis of the impacts of sludge use, a thorough review of the research and consultation with experts in the field.

14. Application of sludge as allowed by the solid waste permit in accord with the Guidelines and regulations and when applied in accord with the Guidelines, will not result in ground water contamination.

15. Application of sludge as allowed by solid waste permit #600015 and applied in accord with the Guidelines, will not result in surface water pollution.

16. The design of the Guidelines and regulations safeguard the environment by checking on the sludge composition, the site where the sludge will be applied, and by securing soil samples after application has taken place.

17. The existence of fractures in the bedrock underlying a site where sludge is properly applied for agricultural purposes will not cause groundwater contamination.

18. If application rates and moisture conditions are controlled as required by the Guidelines, then groundwater contamination will not occur.

19. The application rates permitted by the Guidelines are extremely conservative and they are lower than application rates permitted by the federal environmental regulations.

20. The sludge which will come from the southwest treatment plant in the City of Philadelphia, is considered to be of quality better than produced by most other cities.

21. DER estimates that the disposal program will continue on the approved area for about ten years.

22. The actual sludge applications will occur only during a brief period in each year.

23. DER made on-site inspections and made a chemical analysis of the sludge in question which is presently being disposed of by an ocean dumping program which will terminate in 1981 by order of the Environmental Protection Agency.

24. There are various soil types on the permitted site but the experts are unable to agree on all of them.

25. There is at least one soil bordering the site (Reaville) which is not ideally suited for the sludge disposal, but the predominent soil is Penn loam which does meet the DER guidleines for agricultural utilization of sludge.

26. An important factor in a proper sludge disposal project in addition to soil types and geological features on the site, is the rate of application of the sludge.

27. The site has three wells for monitoring groundwater.

28. The total area of the Kuehnle farm is 90 acres; 37.2 acres were proposed for the permit originally, but the final area agreed upon by DER was 11.4 acres as indicated by Exhibit K-43.

29. Heavy metals in the sludge should be retained in the soil, and since acidic or low pH soil will tend to release these metals, lime must be added to the soil periodically, and for at least two years beyond the time that sludge is put on the site.

30. The cadmium level in the soil is presently 2.4 ppm which is within the DER guidelines.

31. There is some fractured rock under the site.

32. There is no sludge application permitted within 100 feet of Mink Run, the nearest stream. The minimum 100 foot land barrier which goes to a depth of 500 feet at some points, will help to prevent any sludge particulate or residue particles from getting into the stream.

33. The permit prohibits the application of sludge during periods of rain. Any application on wet soil could create a number of problems and is prohibited.

34. The guidelines for sewage, septic tank and holding tank waste use on agricultural lands require soils with a well developed solum.

35. A well developed solum is one where there is a discernable change between the A and B horizons of the soil profile. The A horizon is generally considered the area of maximum leaching of the soil, and the B horizon is the area of accumulation of some of the products of the leaching reaction.

36. Sludge should not be applied to the soil at locations where it could be compacted by tired vehicles.

37. Lysimeters, properly placed on the sludge spreading site would give information concerning water passing through the soil.

38. The interim guidelines of the Department of Environmental Resources do not provide for the placement of lysimeters.

39. Lime should be spread on a sludge site several months before the spreading of the sludge material, for best results.

40. Sludge should not be spread when the weather conditions indicate rain.

41. Although no monitoring is specifically required after the sludge is spread, by any guideline or existing regulation, DER or the Board may properly require the same.

DISCUSSION

Appellants are here in opposition to a permit DER granted under the Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §6001, *et seq.*, on October 4, 1977 allowing the City of Philadelphia hereinafter "City" to dispose of sludge from one of its sewage treatment plants, on a small portion of a 90-acre tract owned by permittee George Kuehnle in Bedminister Township, Bucks County. Appellants have made it clear that they do not see this as a test case for the land application of sewage sludge, in that they do not dispute the fact that sludge can properly be used for agricultural purposes on an appropriate site. It is, of course, one of their contentions, that the Kuehnle farm is not such a site.

STANDING

At the outset, the City would have this Board disregard the appeal of one of the Appellants, Bedminister Township, on the grounds that it lacks standing to bring such appeal. Standing, of course, may be raised at any time and the appeal will be dismissed if none is found.[1] In the recent case of *Strasburg Associates v. Newlin Twp.* ___Pa. Commwlth Ct. ___ A.2d 1014 (1980) the Commonwealth Court appears to have extended the limitations of standing to cover municipalities in circumstances such as here present. In the *Strasburg* case which also concerned a Solid Waste Management permit, the Board had held that the interest which the township has in protecting the groundwater and surface water against the threat to public health etc. was enough of a direct interest to confer standing. Our

1. *Buckingham Twp. Civic Association v. DER* 1977 EHB 236.

Commonwealth Court disagreed.[2] Although the Board has heretofore pursued a liberal policy on standing, we must, of course, follow decisions of all State Appellate Courts. Therefore, we see no alternative but to dismiss the appeal of Bedminister Township for lack of standing.[3]

CLEAN STREAMS PERMIT

The appellants[4] have argued that DER should require permittee, Kuehnle to also acquire a permit under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.*, inasmuch as there is at least the potential for the pollution of Mink Run from the sludge operation. Mink Run is a stream flowing from west to east from 100 to 500 feet from the sludge application area at different points. The land adjacent is covered with weeds and grass and does begin to slope more sharply as the stream is approached. During

---

2. The Court speaking through Judge Crumlish said at page 1018:

> "The Township asserts a host of claims in an effort to show that its direct, immediate, and substantial interests are threatened by the improper design, construction, and operation of the landfill. Most are directed toward such alleged interests as the protection of surface and groundwater resources for residential, commercial, and industrial uses, avoiding the creation of nuisances, and assuring land use compliance with local land use planning. However, standing must again be denied. We cannot extend standing to a Township with the purported interest of protecting the health, safety and general welfare of its citizens without its having met the requisite tests. The Township has failed to show how DER's actions have adversely affected its municipal functions directly, immediately or substantially."

3. It is important to note that the solid waste management permit in question in the instant appeal was processed under Act 241 (the Pennsylvania Solid Waste Management Act) as it existed prior to its amendment on July 7, 1980. This was the Act construed by Commonwealth Court in *Strasburg Associates, supra*. The extensive amendments of July 7, 1980 may have altered the standing of municipalities which pertain under Act 241 prior to July 7, 1980. Therefore, this Board's present opinion should not be construed as deciding the question of standing of municipalities under Act 241, as amended.

4. This will refer only to Wayne Busfield and the other citizen appellants hereafter.

periods of heavy rain[5] appellants expect rivulets to form on the site and to carry particulate matter into the stream. The same result is envisioned by appellants if permittee should decide to plow the sludge application area.

The board agrees that if the sludge were insufficiently renovated by the land to which it is applied so that it entered Mink Pond as "sewage", a permit would be required pursuant to §201, 202 of the Clean Streams Law. However, this board has found that the permitted rate of application of sludge will not result in water pollution runoff (Finding of Fact 8), will not result in surface water pollution (Finding of Fact 15) and that sludge particles and residue will not enter Mink Run (Finding of Fact 32).

Of course, there will be some runoff from the sludge application site and although this runoff will not constitute sewage as such, we have no doubt that DER could, if it so chose, regulate said runoff since the

---

5. The frequency of a rain storm sufficient to create stream pollution in appellants' view ranges to one every six years.

Clean Streams Law proscribes the discharge of "any substance of any kind or character resulting in pollution." In *DER v. Precision Tube Co.* 24 Commwealth Ct. 647, 358 A.2d 137 (1976) faced with the question of whether highway run-off containing motor oil and other pollutants requires that a Clean Streams Law permit be obtained by Penn-DOT for the highway construction project, the Court there said:

> "Section 402, 35 P.S. §691.402, grants the discretionary power to DER to issue regulations and require permits for the discharge of all such miscellaneous pollutants. Although DER has, by regulation, included storm water runoff as a source of potential pollution in specific types of discharge which it regulates, we are unable to find any authority whereby DER has exercised its *discretionary* power to require permits for storm water runoff from highway projects."

We recognize that DER must live within budgetary constraints imposed by our Legislature which, in so doing, indirectly determines how far DER shall go in carrying out new discretionary permit and regulatory programs. Although we agree with appellants, that while permit regulation of sludge disposal sites located near stream beds might be desireable, we find no mandate that it be done, and no abuse of discretion on the part of DER in failing to do it. *Bedford Springs Hotel v. DER and Borough of Bedford* 1977 EHB 284.

THE SITE

DER has acknowledged that there was some confusion at the inception of this matter, because of administrative changes that occurred in DER.[6] One matter, we deem of major concern, raised by appellants has to do with the actual boundaries of the area which is to be the permitted site for sludge disposal. Permittee Kuehnle owns a 90-acre farm and there was some misunderstanding, which extended into the hearings, as to just how much of the farm was covered under the DER permit.[7] An area was staked off on the property and there

---

6. Permits were first issued by the Bureau of Water Quality and this responsibility was transferred to the Division of Solid Waste Management in 1977. A number of permits including one for a site known as Shan Gri La (also known as the Dewey Bunch site) were issued before the present guidelines were in existence.

7. As will later appear there are striking differences in some of the descriptions of the site, between various witnesses. We believe to some extent this was due to the confusion as to exactly where the permitted area was to be located.

was further discussion of whether the permitted area was 37.2 acres as originally proposed by permittee or 28.8 acres. Finally, a survey was conducted and by stipulation the area agreed upon as the permitted site was indicated to be only 11.4 acres and is set out as area "A" indicated on exhibit K-43. Appellants take exception to this method of locating a permitted site. The Board agrees that the permit itself when issued should clearly indicate the boundaries and size of the permitted area. The guidelines provide that the "application for a permit shall be accompanied by adequate maps showing site boundaries and sludge application areas" §73.32 d (2).

Inasmuch as the issue has now been resolved by the belated site location information, we will only say that while appellants have properly raised objections to this procedure, we are now satisfied that the area is sufficiently delineated.

Appellants are particularly concerned about the adequacy of the site for sludge disposal. It must be understood that sludge will be incorporated into the soil and the growing crops within hours after it is applied if it is applied at proper rate and at a time when the soil is not already wet. It is this basic process upon which all else depends.[8] DER developed guidelines for the agricultural utiliza

---

8. The crop is to be Hay or Orchard grass. In explaining the process here involved one expert stated:

> "Q. What horizon is utilized for the agricultural application of digested sludge?"
>
> "A. What the soil scientist calls the Ap horizon, if it is an open field, as in the case of the Kuehnle farm, or the A horizon, if it is a wooded, commonly called the topsoil."
>
> "Q. Compare the capacity of the Ap horizon for treating sewage sludge with the capacity of the B horizon for treating the same thing."
>
> "A. The essential difference between the Ap and B is simply that in the Ap you have your organic matter, whereas in the B, you do not or very little of it in the upper part due to a movement of organic matter through the soil by way of roots and rootlets.
>
> You get very minor translocation or movement of organic matter from the Ap into the B. However, the dominant feature of the Ap over the B is the fact that it contains organic matter."

tion of sewage sludge and the permit here in question, was issued under these

---

Continued 8

"Q. Does the difference change the ability of those two horizons to treat sewage sludge?"

"A. Yes, it does, because in the Ap horizon, you have essentially all of your important biological and chemical activities occurring; whereas in the B horizon you have what is essentially chemical activity, but not nearly as great as what you get in the Ap due to the absence of organic matter.

You have essential differences in what the soil scientist call the cation exchange capacity. The cation exchange capacity of organic matter in the Ap horizon is far greater than the cation exchange capacity of clays that you find in the B horizon of the soil."

"Q. Would it be correct to state that the Ap horizon has superior treatment qualities than the B horizon?"

"A. Relative to the biological and chemical activity, I would say yes."

"Q. Then is the use of the Soil Survey standard setting forth the suitability of a particular soil for sewage disposal appropriate in evaluating an application to apply digested sludge?"

"A. I would say it is irrelevant. You cannot apply one to the other."

9. The permit provides:

"1. Based on the chemical analyses provided in the February, 1977 application, the annual rate of sludge application at this site is not to exceed 4.7 dry tons/acre/year which is also equivalent to 21,466 gallons/acre/year.

The maximum lifetime sludge application at this site shall not exceed 49.8-dry ton /acre which is equivalent to 227,540 gallons/acre.

2. The submission of a complete soil analyses is required after the application of 30 dry tons/acre.

3. You are required to maintain records of quantities, dates and locations of sludge application. Copies of the records shall be made available to the Department upon request.

4. Application of sewage sludge shall be prohibited within:

a. One hundred feet (100') of streams.

b. Three hundred feet (300') of water supplies.

c. Twenty-five feet (25') of bedrock outcrops.

d. Fifty feet (50') of property lines.

e. Three hundred feet (300') from an occupied dwelling."

interim guidelines.[10] Subsequently, these guidelines were adopted by the Environmental Quality Board and they are now Regulations of DER 25 Pa. Code 75.32.[11]

The two major areas of dispute in this case concern the type and

---

10. The interim guidelines were developed by DER through consultation with many others, including an Agricultural Committee.

They provide *inter alia:* Site Selection.

"Agricultural lands selected for application of sludge are to meet the following conditions:

1. Suitable soils are those that fall within the USDA textural classes of sandy loam, loam, sandy clay loam, silty clay loam and silt loam.

2. Soils are to have a well developed solum with a minimum depth of 20 inches to bedrock and/or to seasonal high water tables.

3. Existing slopes at the site are not to exceed twelve percent (12%) except for certain no-till or cover crop applications as previously stated. In addition, no closed depression shall exist on site.

4. Land areas subject to active flooding are not acceptable for sludge application.

5. Soil pH is to be 6.5 or greater. The soil pH may be adjusted by the addition of lime or other suitable material and maintenance of the soil pH at 6.5 or greater is required during the operational life of the site and for two years following the end of sludge application.

6. Depth to the permanent ground water table at the site is to be a minimum of four feet."

11. DER still has guidelines which are to be considered along with the Regulations. They are primarily concerned with application rates.

nature of the soil and the geological limitations of the site. There was assembled, for the lengthy hearings held in this case, a parade of distinguished, and in some cases eminent, technical witnesses. One can only conclude from the wide divergence in much of their testimony that the witnesses were not always examining the same 11.4 acre area we have here indicated to be the permitted site.[12] The guidelines require, for example, that the soil on a sludge site, —"have a well developed solum with a minimum depth of twenty (20) inches to bedrock." Discounting some minor disagreement about what indicates a well developed solum,[13] DER's expert concluded that Penn soil,[14] had a well developed solum and was suitable for renovating treated sewage sludge. Based upon 15 borings he took with a soil auger Mr. Lorenzen testified:

> "So, based upon my investigation of the site, I stated that Penn was the dominant--in fact, my verbiage was "overwhelming dominance" of Penn over Klinesville. According to the interim guidelines, these soils are suitable for sludge application applied at a rate that will satisfy 75 percent of the nitrogen requirements for the proposed crop." N.T. 1141-1142 lines 1-6.

Appellants, not surprisingly, sent experts of their own to the site, who found Reaville soil to predominate. The soil is clearly unsuitable, not only because it has no well developed solum but also because of its shallow, wet condition.

The permittee and the City found support for the position that fractured rock was not a problem on the site:

> "THE EXAMINER: They are not as important in controlling the water; the areas in which water will flow, you mean?"
>
> "THE WITNESS: Right. The dendritic pattern indicates no structural control. It is either joints and fractures are not existent, or they exhibit no control over the movement of water.
>
> The fact is we move from this area to another area and we have less structural control, indicating that the fracture system controlling here is very prominent; that other fractures, even if they occur, are not as prominent." N.T. 1739 lines 5-15.

---

12. The Board rejects the possibilities of ignorance or perjury but, of course, plain error is recognized as an explanation of differences to the extent that the conflicting witnesses viewed the same 11.4 acres.

13. Dr. Charles Tedrow said that the A and B horizons of the soil i.e. the two top layers must be clearly discernable. Douglas Lorenzen, however, stated that the two layers need only be identified "without to much problem".

14. Penn soil is a moderately deep, well drained soil-the soil is anywhere from 20-40 inches deep to bedrock i.e. the "R" horizon.

Appellants believe the site may be up to 75% rock fragments with bedrock appearing at 8" to 12" at some places. We find that the convincing geological data of Arthur Rossman refutes their claim.

Much was made over whether the cadmium content of the soil was too high for the safe agricultural sludge utilization. Dr. Steven Toth[15] ran tests on one sample which led him to believe the cadmium level was 3.6 pounds per acre, thereby exceeding the guidelines of 3.0. This is of special concern because of the affect its accumulation can have in the human body. The permittee and DER have results from three other samples which clearly indicate that the level is only between.2 and.9 pounds per acre. We conclude that the latter tests are accurate. These figures were confirmed by the DER laboratory, Penn State University and the independent Lancaster Laboratories Inc.

It is alleged that heavy metals will accumulate in the soil because of the soil's low pH, that said metals will eventually dissolve and find their way off the site by way of groundwater or surface water unless lime is used to maintain the pH level in the soil at a near neutral value.[16] The permit requires that this level be maintained by lime on the site for two years after completion of the program. Appellants suggest that this operation should continue for an even longer period. We believe this to be a long range concern that should have future attention by DER. Inasmuch as the sludge program is estimated to last more than 10 years and there is an obligation for two years beyond that, there is ample time to address any problems appearing in the course of future soil tests and site review which will be ongoing.

---

15. Dr. Toth who has published over 125 technical publications in such publications as the "American Chemical Society" the "Soil Science Society" and the "Journal of Wildlife Management". He has been a university professor for over 30 years and is Fellow in the American Association for Advancement of Sciences.

16. In acidic soil the metals from the sludge, such as nickel, Chromium, Cobalt and zinc will be released. However, this reaction will not occur in soil with a pH above 6.5.

Perhaps the most graphic evidence that the various witnesses were looking at different portions of the Kuehnle farm, and we believe at times even off of the permitted area, was elicited regarding the slope of the site. The guidelines require that the slope shall not exceed twelve percent (12%). While there are various estimates that the slope ranges all the way up to 40%,[17] we are more impressed with the actual survey that was conducted by a professional engineer, which indicated an average slope of 6.5%.

Appellants raise a number of questions about the need for a monitoring program and argue that the present one is inadequate. There are three monitoring wells being used in an effort to determine what if any changes occur in the groundwater.[18] These wells are all off-site and are to be checked periodically by Bio-Products Inc. There is some question whether the locations of these wells are sufficient to allow true testing based on the movement of groundwater. We would not be satisfied with these wells alone, to monitor the site, because of the unknown factors always present in the movement of groundwater. We note, however, that a comprehensive monitoring program was voluntarily agreed upon between counsel,[19] for the City, DER and the permittee.[20] The monitoring program covered seven items: 1. The sludge itself, 2. Lysimeters to be placed on the site (to check soil moisture) at three locations—two at each location, 3. Three monitoring wells located off-site, 4. Periodic soil analysis (annual), 5. Crop check, 6. Mink Run monitoring-up and down stream, 7. Saturation testing just prior to any sludge application.

---

17. In the area between the site and Mink Run, which is to serve as a land barrier to the stream. A survey showed this slope to be actually 8.5%.

18. The three wells being used are the Kuehnle, Siwert and the McBride well.

19. It appears that Counsel for the citizens never stipulated to this agreement. The Board however, made it a condition of the order denying the supersedeas.

20. This agreement was entered, after a supersedeas was denied the Township. It was based on the City's effort to meet and answer the concerns raised by the Township and its citizens as the program went ahead.

We find this comprehensive monitoring program satisfactory and acceptable to ensure environmental safety on a long and short term basis for the permitted agricultural sludge utilization.

The appellants believe all of their worst fears will be realized if the future sludge spreading operation is conducted like the first four days.[21] Heavy equipment for spreading lime used on the site caused ruts and got stuck. Bio-Products will use a special flotation tired vehicle for all future operations because soil compaction must be avoided for proper agricultural utilization of sludge.

Moreover, there was apparently some confusion about the exact boundaries of the spread site, but this is understandable, based on what we have already said early in this adjudication in that regard. Appellants argue that DER is not capable alone of enforcing the law and regulations pertaining to sludge spreading operations. DER would, no doubt, be the first to agree that citizen complaints play a large part in their enforcement program. Appellants would like to have local government play a major role to insure safety in the sludge program. While we have no particular opinion on their position, we do note that this argument must be more appropriately addressed to our Legislature. Many other possible administrative enforcement problems are anticipated by appellants, who ask that we take various actions now.[22] We agree with appellees that we can not here assume that permittee will fail to abide by the permit and regulations in future operations. When, and if, enforcement problems actually occur, that will be the time for them to be dealt with. In re *Appeal of Klock* 415 A.2d 705 (1980). We have no doubt that appellants and other citizens of the area will be vigilent in their efforts to see that DER properly enforces the law.

---

21. After the permit was issued Bio-Products Inc. started the operation in November 1977, but stopped after four days when objections were raised and later appeals filed.

22. Require that lime be placed on the soil in advance of the sludge spreadin is the recommended procedure. Appellant would like us to order retention basins be constructed on the site to hold run-off before entry into Mink Run.

One final matter deserves our attention, and that concerns the testimony offered at the hearing regarding the sorry state of affairs at the Shan-Gri-La sod farm owned by one Dewey Bunch. Appellants argued that the soil there is similar[23] to that at the Kuehnle farm and offered evidence of the conditions that arose from a sludge application of some years ago, but not under the guidelines at issue in this case. Suffice it to say that we have reviewed the testimony as it pertains to the Shan-Gri-La site[24] and found it to be of no probative value on the questions raised in the appeals before us concerning the Kuehnle site.

CONCLUSIONS OF LAW

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

2. Appellant Bedminister Township has no standing to bring the appeal filed to EHB Docket No. 77-119-D, and the same must be dismissed.

3. Based on the testimony at hearing and a stipulation of the parties, it is clear that the permitted site covers 11.4 acres and is indicated as area "A" on Exhibit K-43 admitted in these proceedings.

4. Appellants have failed to carry their burden of proof to show that DER acted unreasonably, and abused its discretion in granting of Solid Waste Management permit No. 600015 to George Kuehnle, to allow an agricultural application of sludge by Bio-Products Inc. from the southwest treatment plant of the City of Philadelphia.

---

23. In fact most of the soil types on the two sites differ.

24. It is represented to the Board that the Court of Common Pleas of Bucks County on April 17, 1980 granted a Preliminary Injunction against further operation of the sludge site.

5. DER in administering the Clean Stream Law, Act of June 22, 1937, P. L. 1987, *as amended,* 35 P.S. §691.1, *et seq.* need not require that an additional permit be obtained under that Act to permit the land application of sludge for agricultural purposes, based on the fact that the authorized site is 100' or more from a stream, where there is compliance with all regulations under the Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended,* 35 P.S. §6001, *et seq.*

6. The monitoring program ordered by this Board as a condition in denying a Supersedeas in this case on December 6, 1977 has not been terminated and must be continued as a permanent program.

O R D E R

AND NOW, this 26th day of September, 1980, the appeal of Bedminister Township is hereby dismissed for lack of standing. The other appeals filed in the above matter are dismissed for the reasons herein indicated.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Thomas M. Burke

THOMAS M. BURKE
Member

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: September 26, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF DELAWARE WATER GAP, et al. :

:

: Docket No. 78-081-W
: 78-082-W
: 78-084-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
MONROE COUNTY GENERAL AUTHORITY, Intervenor

Pa. Sewage Facilities Act
Clean Streams Law

ADJUDICATION

By: Paul E. Waters, Chairman, September 29, 1980

This matter comes before the Board as an appeal from an order issued by DER on June 22, 1978, requiring the appellant municipalities to plan and construct joint sewage facilities for the Monroe County Region in which they are located. The municipalities denied the findings of DER with regard to discharges of inadequately treated sewage. The Monroe County General Authority, which had prepared a Wastewater Facilities Plan for Eastern Monroe County, was named as the entity with which the municipalities were ordered to adopt and implement a comprehensive water quality management plan. The three concerned municipalities, raise objection to the County General Authority being the entity to carry forward to plan, and argue that DER has taken away their rights and responsibilities under Pa. Sewage Facilities Act, Act of January 24, 1966, P.L. *as amended,* 35 P.S. §750.1, *et seq.*

FINDINGS OF FACT

1. Appellant, Borough of East Stroudsburg is a municipality located in Monroe County, with offices at Municipal Building, East Stroudsburg, Pa 18301.

2. Appellant, Borough of Stroudsburg is a municipality located in Monroe County Pa. with offices located at Municipal Building, Stroudsburg, Pa 18360.

3. Appellant Smithfield Township is a municipality located in Monroe County with offices located at Minisink Falls, East Stroudsburg, Pa. 18301.

4. Appellant, Borough of Delaware Water Gap is a municipality, located in Monroe County with borough offices at Town Hall, Box 218, Delaware Water Gap, Pa., 18327.

5. Intervenor-appellee, the Monroe County General Authority (hereinafter "MCGA"), is a municipal authority incorporated on August 10, 1972, by the Monroe County Commissioners and operated pursuant to its charter, by-laws and the Municipal Authorities Act of 1945, *as amended*, 53 P.S. §301, *et seq.*

6. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter "DER"), which has the duty and obligation to administer The Clean Streams Law, *as amended*, 35 P.S. §691.1 *et seq.* and the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, No. 537, *as amended*, 35 P.S. §750.1 *et seq.* (hereinafter "Act 537").

7. All municipalities in Pennsylvania are obligated to adopt official sewage plans pursuant to Section 5 of the Act 537, 35 P.S. §750.5.

8. Delaware Water Gap has never adopted an official sewage plan.

9. Sewage disposal in Delaware Water Gap is presently effected by on-lot conventional systems, stream discharge from illegal collection systems and stream discharges from privately-owned package treatment plants.

10. A sewage planning expert employed by the DER, David Lamereaux, conducted an independent examination of Delawate Water Gap from the perspective of its present and future sewage disposal needs.

11. Said expert concluded that Delaware Water Gap was characterized by small lot sizes, unsuitable soils for sewage renovation, and steep slopes.

12. A sewage planning study entitled the "Eastern Monroe County Sewage Facilities Plan" was done by the firm of Albright and Friel in 1973 for the Monroe County Planning and Zoning Commission for the area of eastern Monroe County (hereinafter "A&F Plan").

13. Delaware Water Gap did not adopt the A&F Plan as its official plan, under Act 537.

14. The A&F Plan was adopted by the Delaware River Basin Commission (hereinafter "DRBC") and approved by the DER.

15. Pursuant to the recommendations of the A&F Plan, a supplementary facilities plan was prepared by VEP Assoc.-Elam and Popoff, Inc. in 1975 (hereinafter "201 Plan") for the MCGA for a smaller geographical area than the total area reviewed by the A&F Plan, to wit, the metropolitan region of eastern Monroe County.

16. Resolution of the sewage disposal needs of Delaware Water Gap were studied in the 201 Plan.

17. Delaware Water Gap has not adopted the 201 Plan as its official plan.

18. The 201 Plan was adopted by the DRBC and approved by the DER and EPA but not the Borough of Stroudsburg or East Stroudsburg.

19. The recommendations of the 201 Plan would provide an environmentall sound solution to the sewage problems, present and future, in Delaware Water Gap.

20. The chosen alternative is based on a consideration of the unsuitabi of other sewage disposal alternatives for Delaware Water Gap, including the consideration of a "sub-regional approach" of upgrading individual systems and utilizing the cluster concept of collection and disposal.

21. The Boroughs' sole dispute with the recommendations of the 201 Plan appears to be that they are too expensive.

22. Delaware Water Gap has never adopted or submitted to DER or EPA for approval any alternative wastewater treatment proposal providing for the sewage disposal needs of this Borough.

23. Further hydrological studies performed to justify the cost-effectiveness of sewer separation as part of the 201 Plan using the precipitation figures for 1973 as an example indicate that the Stroudsburg sewer system is seriously overloaded at four points and by-passes large volumes of untreated, raw sewage to the McMichaels Creek during periods of wet weather.

24. The Act 537 Plan recommended that the best facility planning for the study area consisted primarily of upgrading the existing Stroudsburg sewage treatment plant ("Stroudsburg STP"), upgrading and expanding (if necessary) of the existing East Stroudsburg Sewage Treatment Plant ("East Stroudsburg STP") to 2.0 million gallons per day (mgd) and constructing a new sewage treatment plant near Delaware Water Gap with a capacity of 3.0 mgd to handle wastewater flows in excess of treatment capacity of 3.0 mgd to handle Stroudsburg plants and to treat flows from Smithfield and Delaware Water Gap.

25. The Act 537 Plan designated the MCGA as the regional wastewater management agency for Eastern Monroe County.

26. The Act 537 Plan further recommended that the MCGA be the institution responsible for the implementation of the regional aspects of the 537 Plan, including the planning, design, construction and operation of regional treatment plants and new interceptors.

27. The Act 537 Plan was adopted by Stroudsburg, East Stroudsburg and the Townships of Smithfield, Middle Smithfield and Stroud as their individual official sewage plans pursuant to Section 5 of Act 537, 35 P.S. §750.5.

28. The Act 537 Plan stipulated that further studies were necessary prior to securing federal financial aid for the regional system.

29. The Act 537 Plan did not comply with the federal construction grant regulations issued in 1975 and had to be revised.

30. Pursuant to the Act 537 Plan's recommendations, the MCGA retained a consultant, VEP Associates - Elam and Popoff, Inc., in 1975 in order to prepare a "201 Plan" for that area proposed for a regional treatment system by the Act 537 Plan.

31. The function of the 201 Plan was to study the feasibility and cost-effectiveness of the recommended regional system to be used as the basis for proceeding through the construction grant process with an application for further federal funding of the design ("Step II") and eventual construction ("Step III") of the new facilities.

32. Out of the eleven preliminary alternatives, four (4) survived the consultant's screening process: Alternatives 1, 3, 4 and 9.

33. The screening process included evaluation of the alternatives against the following criteria: environmental assessment, cost-effectiveness evaluation, contribution to wastewater management objectives, implementation capability.

34. The engineering proposal advanced by the Act 537 Plan was most closely reflected by Alternative 9 in the 201 Plan.

35. Alternative 3 was determined by the 201 Plan to be roughly equivalent to Alternative 9 in the three categories of "Reliability", "Contribution to Goals" and "Environmental Impact" and superior to Alternative 9 in the categories of "Implementation" and "Cost."

36. In order to be acceptable for federal funding, a sewage system must be the most cost-efficient alternative able to meet federal and state requirements. FWPCA, 33 U.S.C. §212(2)(c). This alternative is defined by the EPA grant regulations as "the waste treatment management system determined from the analysis to have the lowest present worth and/or equivalent annual value without overriding adverse nonmonetary costs and to realize at least identical minimum benefits in terms of applicable Federal, State and local standards for effluent quality, water quality, water reuse and/or land and subsurface dispersal."

37. The Alternative finally selected and recommended by the 201 Plan for implementation was Alternative 3.

38. The major facilities recommendations of Alternative 3 include the phase-out of the Stroudsburg STP, the upgrade of the East Stroudsburg STP and the construction of a new regional plant in Smithfield Township near Delaware Water Gap.

39. The principal facilities recommendation changes between the 201 Plan and the Act 537 Plan relate to the abandonment of the Stroudsburg plant.

40. The 201 Plan also recommended certain operation changes compared to the Act 537 Plan with respect to the operation of the East Stroudsburg STP. Specifically, the 201 Plan recommended a unified management system with the MCGA controlling the operation of the upgraded East Stroudsburg STP.

41. The primary reasons for the 201 Plan's recommendations with respect to MCGA control of the East Stroudsburg plant were financing considerations, elimination of duplication problems with respect to equipment and manpower, and flexibility in addressing future expansion requirements.

42. The best available wastewater management planning for the Delaware River drainage basin in which the Appellants are located is the study done by Albright and Friel in 1973 pursuant to the Sewage Facilities Act for the Monroe County Planning and Zoning Commission entitled "Eastern Monroe County Sewage Facilities Plan" ("537 Plan") as modified by the 201 Plan. This planning has been approved by all appropriate planning agencies.

43. The DER finally ordered the MCGA and the five affected municipalities to adopt the 201 Plan as an amendment to their Act 537 Plan and to implement its recommendations because of numerous factors including:

a. DRBC approval of the 201 Plan made it and the Act 537 Plan best available comprehensive planning for the area;

b. The 201 Plan met all federal and state requirements and was a reasonable and well-reasoned approach;

c. The 201 Plan was implementable and eligible for funding;

d. The 201 Plan met the sewage disposal needs of the area and

e. The regional facilities were "immediately" needed by 1975 and were still not at the design stage by 1978.

D I S C U S S I O N

This matter has had a long and interesting history which brings it finally for our decision of today. Five appeals were originally filed from an order issued by DER on June 22, 1978. The joint sewer or regionalization order was based on finding by DER that there were violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* in the Borough of Delaware Water Gap. The Monroe County General Authority had prepared a Water Facilities Plan for Eastern Monroe County, which included the appellant municipalities that would solve the pollution problem aforesaid, while also serving the other areas with more modern facilities. The four[1] municipalities were, in the meantime, making efforts toward joint planning to meet their sewage disposal needs through the incorporation of the Southeastern Monroe County Sewage Authority (SEMSA). This effort lagged and although some steps were being slowly taken over a very long period of time, the board is inclined to believe there was not always good faith effort being made. When the original appeals were filed, a petition for supersedeas was also filed by appellants. DER later joined in a stipulation for this board to grant the supersedeas until such time as a hearing could be held on the merits. The supersedeas was granted on August 14, 1978. The case was scheduled for hearing which was cancelled when the parties suspected settlement was imminent. The elusive settlement, about which we have heard a great deal over the years, did not occur.

After the hearing was finally held, DER moved to have the supersedeas terminated, and also filed a Motion to Dismiss two of the three remaining appeals. On April 7, 1980 the board denied further extension of the supersedeas. Appellants then took an appeal to Commonwealth Court from our decision of April

---

1. Smithfield Township, Stroudsburg, East Stroudsburg, and Borough of Delaware Water Gap. Subsequently Smithfield Township withdrew its appeal.

7, 1980.[2] This appeal was dismissed by Commonwealth Court on June 11, 1980. On August 27, 1980, the Motion to Dismiss the appeals pending before this board, was denied.

It is with this background in mind, that we approach the issues at hand.

At the heart of the matter separating the parties, is the fact that the appellants have never adopted the specific wastewater plan developed by the Monroe County General Authority pursuant to the Water Pollution Control Act, *as amended*, 33 U.S.C. Section 1251 *et seq.* and 40 CFR, Part 35 subpart E.[3] The plan, better known as the 201 plan has been adopted by the Monroe County General Authority[4] the Delaware River Basin Commission, the Environmental Protection Agency (EPA) and has been approved by DER.

All of the municipalities, with the exception of the Borough of Delaware Water Gap adopted the 1973 Albright and Friel plan as their Act 537 Plan. However, this plan provided inter alia—"It is recommended that control of local collection systems remain with the individual municipality. Sewers exert a strong influence on land use. Since land use control rests

---

2. The Motion to Dismiss could not be disposed of during pendency of the appeal to Commonwealth Court. The Board was not notified until August 26, when the record was returned, with the order of June 11, that the appeal had been dismissed.

3. The engineering work was originally done by the firm of Albright & Friel in 1973 for the Monroe County Planning and Zoning Commission. In 1975 a supplementary plan done by VEP Associates-Elam and Popoff Inc. actually became the 201 Plan.

4. The plan actually consists of 11 alternatives. Alternative No. three (3) was the one selected, while No. 9 is more in accord with the original 537 plan.

with the municipalities, sewage collection systems and their resultant implication on land use should rest with the municipality."[5] The Act 537 plan called for the Stroudsburg treatment plant to remain in operation under its present local control.

It is appellants' contention that, although they do not dispute generally the sewage needs of the Borough of Delaware Water Gap, or the general benefits of regional sewage treatment with some central administrative control, they do oppose Alternative No. 3 of the 201 Facilities Plan. They see DER acting as an overlord trying to take away their local rights and responsibilities, under Act 537, by its order of June 1978. The argument is not entirely new. In *Commonwealth v. Derry Township-Westmoreland Co., et al* 351 A.2d 606 (1976) the Commonwealth Court was asked to adjudge certain municipalities in contempt of an order issued under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* requiring them to negotiate and agree on a joint regional sewer system. Faced with the same argument made here, the Supreme Court there said on appeal, upholding a finding of contempt:

> "To permit DER to order municipalities to construct a plant sufficient to serve an appropriate region, but to deny it the authority to order negotiations and agreement concerning use of the plant so ordered to be built would be a narrow and unwarranted construction of the statute. Further, the section is inclusive not exclusive,"such orders may include, but shall not be limited to" the enumerated list. Id. We, therefore, find that the Legislature has given DER the statutory authority to issue the September 10, 1971, order requiring agreement concerning the regionalization of Authority's sewage treatment plant."

The fact that the order is issued to municipalities in addition to the one which is actually causing a violation of the Clean Streams Law does not change the result. In *Westmoreland-Fayette Municipal Sewage Authority, et al.* No. 73-

---

5. DER Exhibit I. Albright & Friel Eastern Monroe County Sewage Facilities Plan (c-1) page 87.

171 B, 3 EHB 391, This Board said:

> "On June 18, 1973, this board issued its adjudication in *Department of Environmental Resources v. City of Uniontown* EHB Docket No. 72-203. We there held that the department has the authority under the Clean Streams Law, *supra.*, to order a municipality which itself is not causing pollution by virtue of sewage discharges, and is therefore not in violation of the Clean Streams Law, *supra.*, to treat such sewage in its sewage treatment plant and to cure the violations of the Clean Streams Law, *supra.*"

Our decision was appealed to Commonwealth Court and, in affirming our decision, President Judge Bowman said:[6]

> "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 protection against actions taken by their sovereign. 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.
>
> This seemingly dictatorial authority which the state may exercise against its subdivisions is not without limitation. The state may not employ its power to establish, destroy or reorganize its political subdivision to camouflage a strategy designed to deprive certain of the citizenry of the subdivisions of their individual constitutional rights."

It is clear that the DER is empowered under §5 and §203 of The Clean Streams Law to order municipalities to implement a specified regional plan to abate the discharge of sewage pollution so long as the DER shows by substantial evidence that the plan is necessary for the abatement of sewage and is a reasonable way to proceed. There, the DER has sustained its burden. The DER has demonstrated that the plan meets the sewage needs of the area, complies with all federal and state requirements, is the most cost-effective alternative, and is eligible for federal funding. This regionalization order can then as

---

6. *DER v. Westmoreland-Fayette* 18 Commonwealth 555.

per the above citation and *Kidder Township v. DER* 41 Pa. Commonwealth Ct. 377, properly be extended to the Borough of East Stroudsburg, Stroudsburg and Monroe County General Authority.

The order appealed can also be sustained on authority of the Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.* Delaware Water Gap has no sewage facilities plan and thus is in violation of Section 5 of the Sewage Facilities Act, 35 P.S. §750.5, while the plans of the other municipalities had to be revised in light of changed circumstances, i.e., in light of the fact that alternative 3 of the 201 Plan is the only fundable alternative.

Thus, pursuant to Section 10 of that Act, 35 P.S. §750.10, all the appellants can be ordered to adopt or revise their sewage facilities plans to accord with the Act 201 plan which, as the comprehensive water quality management plan for the area (Finding of Fact 43) is the only one which DER could approve pursuant to 35 P.S. §691.5(a)(1) and 25 Pa. Code §91.31. Both East Stroudsburg and Stroudsburg Boroughs did adopt the Albright & Friel Eastern Monroe County Sewage Facilities Plan of 1973, as their Act 537 plan.[7] It was this follow-up plan which became the Wastewater Facilities Plan (201 plan) which was approved by DER and was submitted to EPA and approved as fundable. It would seem that if a municipality must implement an Act 537 plan and this must be a plan *approved* by DER, we then must conclude that DER can order implementation of the *only plan* it would be able to approve as being a comprehensive plan. In *Carroll Township v. DER* 409 A.2d 1378. The Court said:

> "The applicability of the Sewage Facilities Act does not depend, as does that of the Clean Streams Law, on whether or not the municipality is or will be polluting. On the contrary, the Sewage Facilities Act is mandatory on all municipalities, requiring each municipality of the Commonwealth to submit a comprehensive plan for the development of present and future sewage treatment facilities.
>
> The declaration of policy in Section 3 of the Sewage Facilities Act, 35 P.S. §750.3, indicates that mandatory

7. Exhibit C-1 page 108: The first step is adoption of the Plan by the Planning and Zoning Commission, the MCGA, the local municipalities and the regulatory agencies. Stroudsburg, East Stroudsburg and the MCGA would then proceed to implement the plan. Prior to construction, several environmental and engineering reports are required by State and Federal regulations.

> municipal planning, as opposed to contemporaneous or ad hoc reactions to changing circumstances, is necessary to accomplish the stated goals of achieving technical competency within local governments, Section 3(5), 35 P.S. §750.3(5), the use of the best available technology, Section 3(6), 35 P.S. §750.3(6), and increased intermunicipal cooperation, Section 3(4), 35 P.S. §750.3(4). Section 5 of the Sewage Facilities Act also indicates that mandatory planning is not designed merely to correct deficient municipal facilities, as is The Clean Streams Law, but that its purpose is also to improve all present and future facilities.

Obviously, DER must be limited in its decisions in this area, whether taken under the Clean Streams Law, the Sewage Facilities Act, or both, by the requirement that they must not be arbitrary or capricious or otherwise an abuse of discretion.[8]

Turning to the sewage plan outlined by the supplemental study of the Metropolitan Region of Monroe County, the 201 Wastewater Facilities Plan, the disagreement between the parties seems to narrow down to two alternatives outlined therein. As previously indicated, DER opted for alternative No. 3 after a long drawn-out but unsuccessful effort was made to bring harmony to the discord[9] among the Appellants. In the meantime costs continued their inflationary escalation and the deadline for the EPA construction grant based upon alternative No. 3 is almost upon us. Even if we were to decide, which we do not,[10] that the municipalities should have the final veto power over a particular wastewater plan, the question would still arise, as to when DER could properly step in to break the impasse. Clearly, the local municipalities by statute are given the power and the duty to initiate sewage facilities planning but where they fail to honor the duty it would be a cramped interpretation of the Clean Streams Law and the Sewage Facilities Act which would preclude DER from taking necessary action. Under any reasonable construction of the Clean Streams Law and Act 537, DER on June 22, 1978, did what had to be done.

---

8. *Berlin, et al. v. DER* 5 Commonwealth Court 110(1971). *Degriffroy, et al. v. DER* 3 EHB 354(1974).

9. While both Stroudsburg and East Stroudsburg wanted to keep their present sewage plants, Delaware Water Gap was not in agreement on any plan acceptable to the others.

10. DER makes the point well in its post hearing brief at page 16.

Aside from the question of cost, which has been removed as an issue at this stage in the proceeding by *Ramey Borough v. DER* 15 Pa. Commonwealth Court 601, 327 A.2d 647 (1974); aff'd__Pa.__, 351 A.2d 613 (1975) appellants raise the question of "implementability". This has been raised as an impediment with the argument that a plan must be politically acceptable to the municipalities involved. Couched in various terms this the argument—"we don't want to do it that way".[11] This argument has been answered by both *Kidder Township v. DER* 399 A.2d 799 and *Carroll Township v. DER*[12] 409 A.2d 1378 (1980). In Carroll Township the Court said:

> "Our conclusion here, therefore, is that the revision procedures of the Sewage Facilities Act provide an exclusive procedural course for a municipality which finds its official approved plan to be unsuitable, and this conclusion is similarly mandated by Section 1933 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1933—".

In the final analysis, if a municipality is not satisfied that DER should have the determining authority as to whether a particular sewage plan is appropriate for that municipality, and that DER is the "big brother" of the relationship, that issue must be addressed to our legislature, and not this board.

Continued 10.

> "Nowhere, as a mandatory element of the Department's exercise of its power to order municipalities to take appropriate steps to prevent pollution is there found a requirement that the Department determine its acts are consistent with local municipal planning. In point of law, the only requirement is the converse. See Act 537, 35 P.S. §750.5(d)."

11. Inasmuch as appellants have not favored us with a post-hearing brief, we can only surmise what their final legal positions are, based on the testimony elicited.

12. On August 27, 1980, we denied a motion to dismiss two of the appeals because appellants had alleged that the 201 plan was different than their approved Act 537 plan. While we have now concluded that it was a supplement and indeed different, we find that the differences are not so great as to take the case outside of Carroll Township and Kidder Township *supra*. On a motion to dismiss, all allegations are construed most favorably to the appellants.

CONCLUSIONS OF LAW

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

2. The Department of Environmental Resources has the authority under The Clean Streams Law, *as amended,* 35 P.S. §691.1 *et seq.*, and the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, No. 537, *as amended,* 35 P.S. §750.1 *et seq.*, to issue orders to municipal entities to execute agreements for the adoption and implementation of an approved facilities plan where the department determines such action is reasonably necessary as part of a comprehensive plan for the watershed to abate and prevent water pollution from inadequate treatment of sewage discharges.

3. This board's review of department orders so issued is limited to whether said orders are arbitrary or capricious or an abuse of discretion.

4. The department has demonstrated with substantial evidence that the 201 Plan constitutes the best available wastewater management system and pollution control strategy for the watershed in which appellants are located and that the terms and recommendations of said 201 Plan are reasonable.

5. Where appellants have not contested the present or future needs for regional facilities, neither the cost of the proposed system ordered by the department to be implemented nor the speculative possibility that other undefined systems might provide equivalent satisfaction of those needs are sufficient bases for invalidating the department's actions.

O R D E R

AND NOW, this 29th day of September, 1980, the appeals of the Borough of Delaware Water Gap, the Borough of East Stroudsburg, and the Borough of Stroudsburg are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

DENNIS J. HARNISH
Member

DATED: September 29, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF HILLTOWN :

:

: Docket No.79-025-W
80-035-W

v. : Surface Mining Conservation and Reclamation Act

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HAINES & KIBBLEHOUSE, INC., Permittee

ADJUDICATION

By: Paul E. Waters, Chairman, September 30, 1980

This matter comes before the board as two appeals, consolidated for hearing, arising out of the grant of a variance to Haines & Kibblehouse, Inc. by DER, pursuant to the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §1396.1 *et seq.* Appellant Haines, argues that no variance should have been required in the first place, for its reclamation plan. Appellant Hilltown Township, argues that a variance was required, but that Haines, which is engaged in a quarrying operation in the Township, was not entitled to one. Specifically, Hilltown urges us to conclude that proper public hearing requirements were not followed and that a township ordinance supersedes certain provisions of the state act. Therefore the variance granted by DER should now be revoked.

FINDINGS OF FACT

1. Appellant Haines & Kibblehouse, Inc., permittee is a corporation having its principal quarrying operation in Bucks County, Pa.

2. Appellant Hilltown Township, is the municipality in Bucks County, in which the Blooming Glen Quarry, here at issue, is being operated.

3. Appellee DER is the governmental agency responsible for administering the Surface Mining Conservation & Reclamation Act.

4. On November 20, 1974, Haines & Kibblehouse, Inc. applied to the Department of Environmental Resources for a permit to operate the Blooming Glen Quarry.

5. On February 9, 1979, the Department of Environmental Resources issued to Haines & Kibblehouse, Inc. Surface Mining Permit No. 1900-1 authorizing the operation of the Blooming Glen Quarry.

6. As part of its application, Haines & Kibblehouse, Inc. proposed a Reclamation Plan requiring the removal of rock within 100 feet of Quarry Road. Said Reclamation Plan further provides for a 45° consolidated rock face, a guard rail along Quarry Road, a berm to be placed between Quarry Road and the edge of the reclaimed quarry face, the planting of a vegetative buffer including trees and crown vetch, and finally, a 6' chain-link fence at the edge of the quarry face.

7. The Department of Environmental Resources required Haines & Kibblehouse to obtain a variance from the department in order to implement the Reclamation Plan. Haines & Kibblehouse appealed from this determination.

8. By letter dated January 24, 1979 Haines & Kibblehouse, Inc. requested the Department of Environmental Resources for a variance to implement a Reclamation Plan requiring the removal of rock within 100 feet of Quarry Road.

9. When one requests a variance, the department requests that the applicant submit sufficient engineering, geologic and other information to the epartment to demonstrate that if the variance were granted, it will adequately protect the public health and safety and meet the other considerations the law requires.

10. A notice of the Request for Variance was duly published in newspapers of general circulation as required by Section 4.2(c) of the Surface Mining Conservation and Reclamation Act.

11. A public hearing was held in the Hilltown Township Building on November 29, 1979.

12. At the public hearing, Haines & Kibblehouse described the Reclamation Plan to the public and, thereafter, the hearing officer, Charles E. Gummo, Assistant Director of the Bureau of Mining and Reclamation, granted the public time to ask questions both of Mr. Gummo and of the Haines & Kibblehouse representatives.

13. The department, after a thorough review of the Reclamation Plan as well as a review of a report prepared by Haines & Kibblehouse, Inc.'s traffic engineer, Robert Pearson, concluded that the Reclamation Plan afforded the public more protection than that provided by a plain 100 foot barrier which the law requires be provided.

14. After the hearing, and after the department's technical staff's evaluation of the Reclamation Plan, by letter dated February 11, 1980 and written by Charles E. Gummo, the Department of Environmental Resources granted the variance authorizing the implementation of the Reclamation Plan and, in addition, imposed additional conditions to the Surface Mining Permit No. 1900-1.

15. Haines & Kibblehouse, Inc., by letter dated March 11, 1980, accepted the conditions imposed by the department as a basis for granting the variance.

16. The Reclamation Plan, which provides for consolidated rock slope that will be at a 45° angle with the horizontal, will provide a solid rock face that is almost perpendicular to the dip of the rock strata, thus providing great stability for Quarry Road.

17. According to the Mining Plan for Blooming Glen Quarry, Haines & Kibblehouse, Inc. shall not remove any material within 100 feet of Quarry Road except where mining is specifically undertaken to develop the slopes as part of the approved Reclamation Plan.

18. Hilltown Township appealed from the Department of Environmental Resources grant of the variance.

19. On June 6, 1977, Hilltown Township passed a zoning ordinance which prohibits any mining extraction closer than two hundred (200) feet to a property line or three hundred (300) feet from the center line of any street.

DISCUSSION

We are here concerned with two appeals which involve the issuance of a variance from the requirements of the Surface Mining and Reclamation Act 52 P.S. §1396.4(b). The appellant Haines & Kibblehouse Inc., the recipient of the variance for an agrillite mining operation in Hilltown Township, Bucks County, argues that it should not have been required to seek a variance for its proposed Reclamation Plan. Appellant Hilltown Township argues that the variance should not have been issued because of shortcomings in the required public hearing procedure and because of a local zoning ordinance.

Looking first at the appeal of Haines & Kibblehouse, it is clear that DER at first refused to approve the portion of their proposed Reclamation Plan calling for operations within 100 feet of Quarry Road and the removal of rock which would create a 45° consolidated rock face. The law provides:

> "..No operator shall open any pit for surface mining operations 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.."
> 52 P.S. 1396.4 b(c)

It was on this basis that DER refused to approve the original Reclamation Plan proposed by appellant. It is now suggested by appellant that no variance should have been required because of the language of 25 Pa. Code 77.102 f (6)[1] which provides that a property line setback need not be maintained where graded slopes are developed *as part of an approved reclamation plan.* Although we are here concerned with graded slopes, there was no approved reclamation plan providing for mining within 100 feet of the road, at the time DER indicated a variance was needed by appellant. We therefore believe that 25 Pa. Code 77.102 (f) 6 is not here applicable. DER did not abuse its discretion or commit any error of law when it required appellant Haines & Kibblehouse to apply for a variance before it would approve the original Reclamation Plan.

As previously indicated, appellant Hilltown Township has also filed a separate appeal from the variance which was granted Haines & Kibblehouse, Inc. Hilltown has an ordinance which prohibits mining within 300 feet from the center line of any street.[2] The variance here at issue would allow some mining as part of the total Reclamation Plan, within 100 feet of Quarry Road.

The first question which must be resolved in deciding whether DER correctly ignored the Hilltown Ordinance is whether the Zoning Ordinance of Hilltown Township is preempted by the Surface Mining Conservation and Reclamation Act. If this ordinance is preempted, DER was correct to ignore it.

---

1. "A property line setback distance shall be maintained during operations except where mining is specifically undertaken to develop graded slopes as part of the approved reclamation plan. Said setback shall be of sufficient width to ensure the integrity of the property line against possible slumping or failure. The minimum setback distance shall be twenty-five (25') in consolidated material and shall be equal to the height of the face in unconsolidated material."

2. Section 516(c) of the Ordinance provides:

> "No extraction shall be conducted closer than two hundred (200) feet to a property line nor closer than three hundred (300) feet from the center line of any street, nor closer than four hundred (400) feet to the point of intersection of the center lines of two streets".

Relying upon Section 17[3] of the Surface Mining Conservation and Reclamation Act, Appellant Township argues that its zoning ordinance is controlling. In *Miller & Son Paving, Inc. v. Wrightstown Township* 32 Bucks Co. L Rep 239 (1978) the Appellant raised the same question. *Miller & Sons Paving Inc.* challenged the validity of the *Wrightstown Township* zoning ordinances, which also has a 300' setback limitation on the basis that it was preempted and superseded by the less restrictive Surface Mining Conservation and Reclamation Act.[4] The Bucks County Court, speaking through Judge Rufe construed Section 17 of the Act as follows:

> "The exception of zoning ordinances is a clear, unequivocal, unqualified exemption from the supersession or preemption of the Surface Mining, Conservation and Reclamation Act, and while we do not really believe that was the intent of the legislature, that is certainly the clear and plain effect of the language as set forth in Section 17. We do not propose to judicially "legislate" something different from that plain language by speculating what the legislature "really intended."

It could not be made clearer, that the zoning ordinance of Hilltown Township is not preempted by the Surface Mining Conservation and Reclamation Act.[5] Since the ordinance is not preempted, the second question is whether DER must consider local zoning when passing upon a variance request. Although nothing in the statute or regulations expressly so provides, we find that DER is required by Article I, Section 27 of the Pennsylvania Constitution to ensure compliance with local zoning since the Municipalities Planning Code, Act of July 31, 1968 P.L. 805, *as amended*, 53 P.S. §10101 *et seq.* is an applicable statute(s)"...relev

---

3. "Except with respect to Zoning Ordinances, all local ordinances and enactments purporting to regulate surface mining are hereby superseded. The Commonwealth by this enactment hereby preempts the regulation of surface mining operations as herein defined."

4. The Regulations promulgated under the Act further require a twenty-five foot setback from any property line. 25 Pa. Code Chapter 77.92 Sub-Chapter E Section 77.102 (f) 6.

5. The decision of the Bucks County Court was appealed to Commonwealth Court and was upheld on the opinion of Judge Rufe. 405 A.2d 568 (1979). While an appeal to our Supreme Court is pending, we believe ourselves bound by the latest decision.

to protection of the Commonwealth's public natural resources," *Payne v. Kassab*, 14, Pa. Commonwealth Ct. 491, 323 A.2d 407 (1974); affirmed 361 A.2d 448 (1977); *Citizens for Orderly Progress v. DER*, 36 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978).

This board is aware that the above described duty to consider local zoning imposes some practical problems upon DER. There may be separate proceedings pending, concerning the validity of zoning before the relevant Court of Common Pleas. In such an instance we do not feel that DER need await the outcome of the Common Pleas Court proceeding before passing upon a permit or variance which might be affected by local zoning.[6]

In this regard, it is interesting to note that when the *Wrightstown Township* case was before this board on a related issue[7] in the case of *Wrightstown Township et al. v. DER and Miller & Son Paving Inc., Permittee* 75-307-W, 1977 EHB 312, we said:

> "There is some question whether the statute now before us (Surface Mining Conservation and Reclamation Act) goes further than the Solid Waste Management Act by expressely 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."

---

6. Also, we believe that the DER and the EHB must apply the municipal zoning ordinances as it finds them. Neither should involve itself in adjudicating the validity of local zoning ordinances or interpreting and applying special exemptions, conditional uses or variances. That relief still must be sought from the local zoning hearing board or the municipal governing body as provided by the municipal planning code.

7. The Township appealed from the grant of a surface mining permit under the Surface Mining Conservation and Reclamation Act to *Miller & Son Paving, Inc.*, and argued *inter alia* that a local zoning ordinance was not complied with. Our conclusion of law was "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."

However, when the zoning ordinance has been approved by the County Court and no appeal has been taken or where there has been no appeal from or challenge of the zoning ordinance at the time of its permit review, DER must consider the ordinance. Since DER failed to consider the Hilltown Township Zoning Ordinance in the present matter, we must sustain the appeal of Hilltown Township. (See in this regard especially [*Fox v. Central Delaware Community College* 475 Pa. 623, 381 A.2d 448 (1977)].

CONCLUSIONS OF LAW

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

2. DER did not abuse its discretion or violate 25 Pa. Code 77.102 (f)6 or any other regulation in requiring Haines & Kibblehouse Inc. to seek a variance for a reclamation plan which required the removal of rock within 100 feet of a public road.

3. Where a local zoning ordinance requires more restrictive setback or mining limitations near public roads, than is required by the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, ~~as amended~~, 52 P.S. §1396.1, *et seq.*, the former will control, pursuant to Act I, §27 of the Pa. Constitution.

4. Because the variance granted by DER is in conflict with a valid zoning ordinance of Hilltown Township, the decision to grant such variance must be reversed by the board inasmuch as the ordinance takes precedence.

O R D E R

AND NOW, this 30th day of September, 1980, the appeal of Haines & Kibblehouse, Inc. to No. 79-025-W is hereby dismissed. The Appeal of Hilltown Township to No. 80-035-W is hereby sustained, and the decision of DER granting the variance to Haines & Kibblehouse, Inc. is hereby reversed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: September 30, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

E. ARTHUR THOMPSON, et al : Docket No. 79-185-H

Constitutional Law:
Constitution of Pa. Art. I
Sewage Disposal:
Revision of Official Plans

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WICHARD SEWER COMPANY, INC. and
WICHARD-MILLER JOINT VENTURE, Intervenors

ADJUDICATION

By: Dennis J. Harnish, Member , October 16, 1980

This matter is before the board on the appeal by certain residents of Horsham Township, Montgomery County from DER's approval of an Act 537 plan revision submitted by Horsham Township on behalf of the intervenor, Wichard Sewer Company, Inc. A hearing was scheduled for the said appeal during April of 1980 but the hearing was postponed at the request of the appellants in order to allow them time to obtain counsel. Nevertheless, when the hearing was held in this matter on July 7 and July 8, 1980, appellants had still failed to obtain counsel and one of the appellants, Mrs. Elizabeth H. Steele, acted as her own attorney.

The board has now received from the parties their briefs and based upon said briefs, the notes of testimony taken at said hearing and exhibits introduced

thereat as well as a view of the area conducted by the above member, acting as hearing examiner, we enter the following:

FINDINGS OF FACT

1. Appellant, E. Arthur Thompson, is an adult individual and resident of Horsham Township, with an address of 705 Cedar Hill Road, Horsham Township, Pennlyn, PA 19004.

2. Appellant, Albert M. Comly, is an adult individual and resident of Horsham Township, with an address of 954 Limekiln Pike, Maple Glen, PA 19002.

3. Appellant, Elizabeth H. Steele, is an adult individual and resident of Horsham Township, with an address of 711 Oak Terrace Drive, Ambler, PA 19002.

4. Intervenors, Ronald S. Mintz and Philip Miller, t/a Wichard-Miller Joint Venture, a Pennsylvania partnership with office address at P.O. Box 564, Willow Grove, PA 19090, is the owner of approximately 216 acres of land located in Horsham Township on which location it is developing a residential housing development for six hundred forty-eight (648) dwelling units on approximately eight thousand (8,000) square foot lots. The development is known as Country Springs Development.

5. Intervenor, Wichard Sewer Company, Inc., is a duly organized Pennsylvania corporation with offices located at P.O. Box 546 , Willow Grove, PA 19090, and is the public utility which will provide sewer service to the above-mentioned housing development.

6. The lot sizes for the above development are not conducive to on-site septic systems.

7. In approving the 537 Plan revision for Horsham Township relative to the subject tract, DER determined that sewage treatment to be provided by the

Wichard Sewer Company was the most viable alternative to provide sewer service to the tract at this time.

8. There is no evidence that this alternative will have any adverse economic impact upon the citizens of Horsham Township.

9. There is no evidence that this alternative will have any adverse environmental impact.

10. Implementation of this alternative will not deter the provision of sewerage services to the problem areas of the surrounding portion of Horsham Township and, in fact, the Wichard Sewer plant may provide an option for partially addressing these problems.

11. Implementation of this alternative will have no effect upon the alternatives presented by the Environmental Impact Statement recently published by EPA for this area since EPA has deleted Country Springs Development from the EIS and has concluded that this will not bias or eliminate any alternative.

12. Country Springs Development received conditional use zoning approval from Horsham Township for the entire tract and also received preliminary and final subdivision plan approval for phase 1 of the development which includes 223 units.

13. The Wichard Sewer Company, Inc. has received a certificate of convenience from the Pennsylvania P.U.C. to provide sewerage service to Country Spring Development.

14. Horsham Township adopted the subject plan revision by resolution entered on a DER form at a regular business meeting. This was the precedure utilized by the Township for adopting all other plan revisions which have to date been submitted by the Township to DER.

15. Sewer District "D" established by ordinance by Horsham Township did not form a portion of the Township's Offical Plan and was not altered by the subject plan revision.

16. No public sewage services are presently available in the vicinity of the Country Springs Development and none will be available for a period of up to 7 or more years.

17. The Horsham Township Water Authority has represented to DER that it can supply 225,000 gpd of water to Country Springs Development from its present system without requiring any new wells.

18. The proposed Wichard Sewer Company sewage treatment plant would discharge into Park Creek upstream from at least one Horsham Township Park.

19. The effluent limits as set in the NPDES permit issued to Wichard Sewer Company will protect all present and future uses of Park Creek as well as DER's water quality criteria for that receiving stream.

DISCUSSION

The intervenors, Ronald S. Mintz and Phillip Miller t/a Wichard-Miller Joint Venture, are attempting to develop a tract of approximately 216 acres of land located in Horsham Township, Montgomery County by constructing some 648 dwelling units thereupon (each unit being located on a lot having an area of approximately 8,000 square feet). The above described proposed development, which is known as Country Springs Development, was permitted, following hearing, by Horsham Township as a conditional use under the township's zoning ordinance and the first phase of this development, including 223 units, has received preliminary and final subdivision approval from the township.

Because the small lot sizes involved precluded replacement of on-lot sewage disposal systems, the intervenors decided to address the sewage disposal needs of the proposed development via a sewage collection system. No public sewer service presently exists near the proposed Country Springs Development and the intervenors were advised by the Horsham Township Sewer Authority that none

would be available in the near future. Thus, the intervenors also determined that it would be necessary to construct and operate a sewage treatment plant to service their development.

To effectuate this design the intervenors incorporated the Wichard Sewer Company, Inc. and that entity applied to the Pennsylvania P.U.C. for a certificate of convenience to operate a sewage treatment plant.

The Wichard Sewer Company, Inc. also applied to Horsham Township to have that township's sewage facilities plan revised to show the Country Springs Development being serviced by a private sewage collection and treatment system owned and operated by the said corporation. The township obliged Wichard Sewer Company by submitting such a revision to DER and it is upon DER's approval of this plan revision that the instant appeal is based.

It is worth noting that the present appellants and other residents of Horsham Township have fought the intervenors' attempt to develop Country Springs at every turn. At least six actions have been joined in a variety of forums having to do with zoning and plan approvals for the proposed development as well as the certificate of convenience issued by the P.U.C. to Wichard Sewer Company.

Apparently, the present appellants did not prevail in any of the other forums and, naturally, they desire to litigate here the wisdom of allowing the Country Springs Development to proceed as planned as well as the environmental consequences of the proposed sewer system. However, Commonwealth Court has clearly determined that neither DER nor this board may second guess local zoning and planning decisions. In *Delaware County Community College, et al v. Fox, et al*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975), Commonwealth Court held:

> "As we read the Sewage Facilities Act, the function of the DER is merely to insure that proposed sewage systems are in conformity with local planning and consistent with statewide supervision of water quality management; it is the local government agencies, who are responsible for planning, zoning and other such functions." 20 Pa. Commonwealth Ct. 335, 351-352

Even though, as per *Fox, supra*, appellants cannot, here, litigate local zoning and planning issues, it is appropriate for this board to review DER's plan approval to determine whether 1) DER complied with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources; 2) DER made a reasonable effort to reduce the environmental incursion to a minimum and 3) that the environmental harm which would result from the proposed sewage system does not so clearly outweigh the benefits to be derived from that system that to proceed further would be an abuse of DER's discretion. *Payne v. Kassab*, 11 Pa. Commonwealth Ct. 14, 312 A.2d 86 (1973); *Fox, supra; Concerned Citizens for Orderly Progress v. DER*, 36 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978).

Viewed against this standard of review, several of the issues raised by the appellants deserve to be discussed.

A. Horsham Township's adoption of the plan revision.

First, appellants, correctly, note that, pursuant to 25 Pa. Code §71.16(b), DER cannot consider for approval a sewage facilities plan revision unless it is accompanied by evidence of municipal adoption.

Appellants acknowledge that Horsham Township did adopt the plan revision in question and a copy of a DER form upon which the township's adopting resolution is entered is of record. Appellants, however, argue the Horsham Township's resolution is an improper and ineffective adoption.

In this regard, appellants rely upon Horsham Township's ordinances 201 (6000) and 6010 and its Home Rule Charter, all of which are of record. Appellants' intial argument is that, pursuant to §3 of Ordinance 201(6000) the location of sewers in the township had to be designated by ordinance and only by ordinance

while, their second argument is that pursuant to ordinance 6010, sewer district "D" was created which includes the intervenor's proposed development and the Horsham Township Sewer Authority was exclusively empowered to sewer this area.

The board questions the merit of both arguments. Addressing, the second argument first, ordinance 6010 does appear to empower the Horsham Township Sewer Authority to provide sanitary sewer service to Area "D" of the township but this ordinance nowhere precludes or preempts private sewerage projects. In fact, Section 13 of this ordinance clearly acknowledges the right of private systems to exist unless and until the township's sewer system becomes available.

As to the first argument, the record is clear that the plan revision in question did not alter Sewer District "D" which remains the same area today as it was prior to the plan revision. Thus, even if ordinances 6000 or 6010 require that sewer districts can only be changed by ordinance, nothing in said ordinances requires that an Act 537 plan revision be adopted by ordinance as opposed to resolution since the plan revision *per se* does not change the sewer district.

Appellants also argue that, pursuant to the Horsham Township Home Rule Charter, a public notice (§211.6) and public hearing (§501) were required prior to township approval of the plan revision, whereas the resolution in question was passed at a regular business session without prior public notice. Again, the board has difficulty in agreeing with the appellants. All other Act 537 plan revisions submitted to DER by Horsham Township (and those of most other municipalities) have also been accomplished by resolutions (rather than ordinances) adopted at regular business sessions. Thus, it would appear that the Horsham Township supervisors, the elected officials responsible for implementing the Home Rule Charter, did not interpret this Home Rule Charter as requiring the notice and hearing sought by appellants.

Moreover, Mrs. Elaine Hughes, a Township Supervisor and witness for the appellants did not assert that the procedure used by the township supervisors in adopting the instant plan revision were legally improper but merely that these procedures were unwise considering the controversial nature of the Country Springs Development.

Furthermore, assuming, arguendo, that either of the appellants' arguments regarding procedural defects in Horsham Township's adoption of said plan revision was well-founded, these arguments are addressed to the wrong forum. In *Buckingham Township Civic Association v. DER, et al*, 1977 EHB 236 this board was also presented with an appeal from a DER approval of a sewage facilities plan and appellants there, too, raised the procedures whereby the sewage facilities plan was adopted. As this board noted in *Buckingham, supra*:

> "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."

This board's *Buckingham* opinion finds indirect support in the opinions of the Court of Common Pleas of Montgomery County and Commonwealth Court, which are attached to appellants' brief. Both of the said Courts rejected appellants' attempt to raise the township's Home Rule Charter in an attack on Horsham Township's zoning ordinance. The Courts found that the Home Rule Charter did not supersede the Municipalities Planning Code. Similarly, this board finds that the Home Rule Charter does not supersede the Sewage Facilities Act or the regulations promulgated thereunder. Since as appellants acknowledge on page 12 of their brief, "[t]here is nothing in any of the acts that states amendments to the sewage facilities plan must be by resolution or ordinance", this board can find nothing wrong with DER's acceptance of Horsham Township's resolution as evidence of the township's adoption of a plan revision.

B. Environmental Concerns.

1. Water Supply

Appellants' environmental concerns with regard to the proposed Country Springs Development center around feared depletion of the township's groundwater supply and pollution of Park Creek.

With regard to the groundwater issue, appellants did introduce evidence that the groundwater resources of the township are a limiting factor with regard to future development in the township.

Appellants also attempted to introduce evidence regarding potential pollution of the groundwater by trichloroethylene as well as pollution from Park Creek (which could, it is alleged enter the acquifer during drought conditions). Of course, any pollution of the acquifer could reduce the availability of that portion of the acquifer as a groundwater supply and thus this pollution, if any, could have an impact on the township's available water supply. The intervenors strenuously objected to much of the groundwater pollution evidence and it was excluded from direct testimony. Nevertheless, groundwater pollution and its nexus with groundwater supply is discussed in appellants' Exhibit 15 which is of record.

The problem with appellants' evidence is that it is qualitative rather than quantitative in nature, i.e., even if one accepts the appellants' evidence there is no indication of how much groundwater would be affected. The Horsham Township Water Authority has represented to DER that it can supply the 225,000 gpd of water needed by Country Springs Development from its present wells.

Dr. Henry A. Bart, an expert witness for the appellants, could not refute the Authority's representation but rather could merely suggest, on page 100 of the notes of testimony, that "it is conceivable that the aquafer(sic)... would be overpumped". Of course, almost anything is "conceivable" and since Dr. Bart's conclusion was not based on any hard evidence of present withdrawals from the acquifer underlying Horsham Township, appellants have not satisfied their burden of proof on this issue. (See §21.101(c)(3) of this board's rules.)

2. Park Creek

As to the environmental impact of the proposed discharge into Park Creek, on wildlife and the township parks it is of record that the proposed sewage treatment plant would discharge to Park Creek above at least one township park, a park in which fishing and ice skating and wildlife are among the present uses.

Although the actual quality of the effluent which would be discharged into Park Creek from the Wichard Sewage Treatment Plant is governed by the NPDES permit issued by DER to that company which is not in issue in this proceeding, Art. I, §27 requires that DER, in approving a plan revision calling for a surface discharge, must consider the environmental impact of that discharge. DER has done so in the instant matter. Mr. Glenn Stinson, a DER official testified that he was responsible to obtain water quality information from DER's Bureau of Water Quality Management to guide DER's Bureau of Community Environmental Control in reviewing Wichard's plan revision.

Mr. Stinson did obtain such information from Mr. James J. Ridolfi who was a planning engineer for BWQM. Mr. Ridolfi testified that he found it was technologically possible for the effluent from the proposed Wichard sewage plant to be treated at a level which would ensure that the present and future uses of Park Creek would be sustained and that DER's water quality criteria for Park Creek would be met.

Appellants introduced no evidence to counter Mr. Ridolfi's testimony. Thus, on this record there is no evidence that the proposed sewage discharge would harm Park Creek in any way. Because the appellants have not been able to demonstrate that the proposed project will cause any environmental damage there is no need to minimize the environmental incursion or to balance environmental damage against social benefit. *Concerned Citizens, supra.*

C. Planning Agency Comments

The appellants also suggest that DER failed to consider the comments of the Montgomery County Municipal Planning Authority, the "area wide planning agency" as required by 25 Pa. Code §71.16(e)(2).

The problem with this argument is that Mr. Stinson testified that he did consider the negative comments of the MCPC but that in view of Horsham Township's zoning and subdivision planning approvals of Country Springs Development, he decided to approve the plan revision anyway. In view of the fact that comprehensive planning is abstract and recommendatory as opposed to the zoning which implements that plan *Duran Investments v. Muhlenberg Township Board of Commissioners*, 10 Pa. Commonwealth Ct. 143, 309 A.2d 450 (1973), Mr. Stinson (and consequently, DER) cannot be held to have abused discretion in relying upon zoning rather than comprehensive planning.

D. Economic and Planning Issues

The appellants' final argument rests on the fact that Horsham Township and the neighboring Townships of Warminister and Warrington have submitted plans and applications for sewage facilities construction grants to the United States Environmental Protection Agency for an area generally including the locus of Country Springs Development.

Appellants urge, alternatively, that plan approval for Country Springs Development is premature pending a general solution to sewerage problems in the area and/or that the economic impact of permitting a private sewerage project on the costs of sewering the remaining portions of Horsham Township has not been considered. In fact, U.S. EPA's Draft Environmental Impact Statement for the above described sewerage project drew comments along the lines of apellants' concerns.

EPA, however, has answered those concerns in its final EIS and in its letter dated August 7, 1979 to DER (which are of record). Essentially, EPA has deleted Country Springs Development from the area covered by the EIS. Moreover,

EPA has affirmed, in its August 7, 1979 letter, that deletion of Country Springs would not bias or eliminate any of the alternatives considered in the EIS. Thus, there is no planning problem with regard to the plan approval vis à vis the EIS.

As to the economic issue, appellants did not introduce any evidence to show that allowing Country Springs Development to proceed would increase the cost of sewering existing problem areas in Horsham Township. If anything, the existence of the Wichard Sewer Company plant and an agreement between the Horsham Township Sewer Authority and Wichard Sewer Company would seem to offer the HTSA another option for addressing present needs.

Apparently, appellants believe that intervenors should wait for seven or more years before proceeding with Country Springs Development in order that the new units in this development could be added to existing homes to reduce the costs/unit for sewering the existing homes. However, appellants forget that absent an approved sewage disposal system the 216 acres in question will remain, as it presently is, completely undeveloped which certainly would not help to defray the cost of any proposed system. Under the circumstances, we find the DER was not arbitrary and capricious in rejecting appellants' suggestion.

CONCLUSIONS OF LAW

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

2. DER has not violated the Sewage Facilities Act or any statute or regulation in granting the plan approval here in question.

3. DER has not violated its duties as a trustee under Article I, §27 of the Pennsylvania Constitution in granting the plan approval here in question.

ORDER

In view of the above analysis, DER's approval of the Sewage Facilities Plan Revision for Country Springs Development is upheld and the appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

BY: DENNIS J. HARNISH
Member

DATED: October 16, 1980

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ABINGTON TOWNSHIP	:	
VS.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	DOCKET NO. 78-012-S Federal Clean Water Act

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

BY THE BOARD:

Under and by virtue of the provisions contained in Section 201 (g) (1) of the "Clean Water Act of 1977", 33 USCS §1281 (g) (1), the Administrator of the Environmental Protection Agency (EPA) is authorized to make grants of funds to, inter alia, any municipality for the construction of publicly owned "treatment works"[1]

Before the E.P.A. can approve any such grant, it must determine, inter alia, that the project for which the grant is sought has been certified by the appropriate state water pollution control agency as entitled to priority over other such projects. See Section 204 (3) of the "Clean Water Act of 1977", 33 USCS § 1284 (3).

---

[1]The term "treatment works" means, inter alia, sewerage collection systems. See Section 212 (2) (A) of the Clean Water Act of 1977, 33 USCS § 1292 (2) (A) and 40 CFR § 35.905.

On December 13, 1977, Abington Township (Abington) a township of the first class situate in Montgomery County, by its special counsel, made a written request to the Commonwealth of Pennsylvania, Department of Environmental Resources (D E R), the water pollution control Agency for this Commonwealth, that DER certify for federal funding the construction of a collector sewer which would service a certain area of Abington Township.

On January 6, 1978, DER, by an authorized employee, denied Abington's request for certification. On February 6, 1978, Abington filed an appeal from that denial to this Board.

On April 10, 1978, DER filed a motion to dismiss this appeal on the theory that since a denial of a request for certification is not an appealable action, we had no jurisdiction to entertain such a challenge.

On August 7, 1978, we entered an opinion and order in which the motion to dismiss was denied. On August 28, 1978, DER filed with this Board a petition for reconsideration of our order in which we denied its motion to dismiss and a request for argument en banc. We denied this petition on September 20, 1978.

Since many of the facts which were relevant to this appeal were undisputed, Abington and DER entered into two pre-hearing stipulations, both of which were made a part of the record at the commencement of the hearing on the merits of this appeal; this

hearing was held on April 20,. 1979. Furthermore, there was a stipulation at the commencement of said hearing that all exhibits which each party intended to offer would be admitted without more.[2]

FINDINGS OF FACT

1. Abington is a township of the first class, situate in Montgomery County, Pennsylvania.

2. In 1971, Abington adopted an Official Sewage Facilities Act Plan, required under and by virtue of the provisions contained in the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, 35 P.S. § 750.1, et. seq.

3. In said Official Sewage Facilities Act Plan, an area of Abington known as the Washington Lane/Rydal area was designated as an area in which it was critical for a sewage collection system (Collector) to be installed.

4. In said Official Sewage Facilities Act Plan, it was provided that the sewage which would be collected in the Collector would be conveyed for treatment to the Sandy Run Sewage treatment plant, which was owned by Abington and which is situate in an adjacent municipality, Upper Dublin Township.

5. Abington, along with several other municipalities, is situate in the watershed of Pennypack Creek.

6. In March, 1973, Abington and Lower Moreland Township Authority (LMTA) submitted an application to DER for the construction and the

---

[2]After June 19, 1979, the date when Abington, by counsel, submitted its initial post-hearing brief, there was a significant change in the position of DER as to the issues in dispute in this appeal. Furthermore there was a significant post-hearing development which has also altered the issues to be decided herein. We will deal with this change and this development later in this Adjudication.

operation of a sewage system, including several collector sewers and interceptor sewers to the City of Philadelphia to service certain sub-drainage basin areas in an area which was designated as the "Central Pennypack Creek Drainage Basin". At the same time, said entities filed an application to DER that it certify said project as entitled to sufficient priority so as to cause EPA to issue a federal grant for such project. These applications shall collectively hereinafter be referred to as the "Interceptor Application".

7. Although Abington believed it to be crucial that the Collector be constructed at the time when the Interceptor Application was filed, and although such Collector was to be located in the Central Pennypack Drainage Basin, a request for funding of the Collector was not included in the Interceptor Application. This was due, primarily, to the fact that numerous residents had made known to Abington their opposition to the construction of the Collector, and, secondarily, to the fact that Abington's engineering consultants were uncertain, in March, 1973, that the Collector was eligible for federal funding.

8. At or about the same time when the Interceptor Application was submitted, the Bryn Athyn Borough Authority (BABA) submitted an application to DER for the construction of sewers and a spray irrigation system to serve the Borough of Bryn Athyn, which is also located in the Central Pennypack Drainage Basin. At the same time, said entity filed an application that DER certify said

project as entitled to sufficient priority as so to cause EPA to issue a federal grant for such project. These applications shall collectively hereinafter be referred to as the "Spray Irrigation Application".

9. On August 12, 1974, DER submitted its fiscal year 1975 federal construction grant priority list to EPA. DER requested federal funding for 58 of the projects described in said list. DER ranked the Interceptor Application 33rd on said list; DER ranked the Spray Irrigation Application 91st on said list.

10. EPA refused to approve either of said applications for federal funding because it contended that they conflicted with each other. EPA requested that DER take appropriate steps to resolve these conflicts.

11. The conflict over whether an interceptor or spray irrigation proposal was the most cost-effective alternative to treat the wastewater flow from the central Pennypack Creek drainage area was a reason for the great delay in producing an appropriate treatment program.

12. An overall project to treat sewage generated in the watershed of Pennypack Creek has appeared, in one form or another, on the priority list prepared by DER, with a fundable priority in every year since the 1973 Interceptor Application was first listed on the fiscal year 1975 list.

13. The Collector will be a component part of any such overall project.

14. At the same time when Abington was preparing and submitting the Interceptor Application, Abington was also preparing to upgrade the level of treatment at the Sandy Run Sewage Treatment Plant in response to a notice from DER so to do.

15. It was planned that the wastewater to be conveyed in the Collector would flow to said Sewage Treatment Plant until such time as the overall project to treat sewage generated in the watershed of Pennypack Creek (Central Pennypack Sewerage Project) was completed.

16. In March, 1974, Abington submitted an application to DER for a permit for the upgrading of said sewage Treatment Plant and an application to DER that it certify said upgrading project as entitled to sufficient priority so as to cause EPA to issue a federal grant for such project.

17. Although DER would have given consideration to certifying the Collector as fundable in said Sewage Treatment Plant upgrading project, Abington refrained from including the Collector in its federal grant application for said project.

18. The Sandy Run Sewage Treatment Plant grant application was certified by DER to EPA on October 22, 1975, and on September 16, 1977, EPA awarded Abington a grant for said upgrading project.

19. In 1974, Abington passed resolutions authorizing the construction of the Collector and on November 18, 1974, DER issued a permit to Abington approving such construction.

20 Abington was delayed in its efforts to construct the Collector because of opposition to such construction from residents of the

Washington Lane/Rydal area. ("Residents"). The opposition was manifested, inter alia, by the filing of protests against Abington in the Court of Common Pleas of Montgomery County ("Court") in August, 1974 and May, 1975.

21. On February 27, 1976, DER issued an Order to Abington to proceed with the construction of the Collector and to complete such construction by May 1, 1977. In said Order, DER made findings that the Collector was necessary to eliminate groundwater pollution from malfunctioning on lot sewage disposal systems, that such construction was economically feasible and that the Collector would provide the least cost overall solution for the permanent elimination of health hazards and ground water pollution.

22. Certain of the Residents filed an appeal from said Order to this Board in March, 1976. This appeal was captioned as Samuel Persky, et. al. v. Department of Environmental Resources and Abington Township, Intervenor. This appeal was docketed at our Docket No. 76-038-D.

23. By reason of the above mentioned litigation, Abington was unable to proceed with the sale of bonds to finance the construction of the Collector and with the acceptance of a low bid of $641,935.00, which had been submitted in response to a solicitation for bids.

24. During the course of settlement negotiations in the appeal to this Board from the DER Order of February 27, 1976, directing Abington to proceed with the construction of the Collector, counsel for the Residents inquired as to whether DER could certify the Collector

construction project, by itself, as entitled to priority for federal funding. DER replied in the negative to this inquiry on the theory that the Collector construction project, by itself, did not have sufficient priority points for such funding.

25. Thereafter, counsel for the Residents inquired as to whether DER could include the Collector construction project in the Central Pennypack Sewerage Project, earlier studies with regard to which were then causing DER to lean toward a conclusion that a spray irrigation system was the most cost effective treatment alternative for said watershed.

26. On June 23, 1976, the Court took action which resulted in the dismissal of the protests which had earlier been filed therein by the Residents. This action was appealed to the Commonwealth Court of Pennsylvania by the Residents.

27. On June 28, 1976, Marshall Cashman who was the chief administrator of the federal grants program for DER wrote to the Township with regard to said second inquiry made by Counsel for the Residents and stated as follows:

> "This is in regards to your inquiry whether the proposed sewers for the Washington Lane Area are eligible for a Federal grant if the Pennypack Study project results in the preparation of a

Step 2 application upon the return of pending Step 3 applications from the affected municipalities.[3]

The Washington Lane Area of Abington Township would be eligible for inclusion in a Step 2 application for the Pennypack Study project. This area would be in addition to the areas to be sewered as proposed in permit application no. 4673406 pending with the Department. Therefore, all construction cost associated with collection and conveyance and also treatment under the spray irrigation alternative would be included as eligible costs in the Step 3 grant.

Pennsylvania's allocation of Federal funds is sufficient to fund the Pennypack Study project Step 2 application and the return of the Step 3 application will not jeopardize the fundability of the Township's project. When the Step 2 application is completed, it will be certified to the Environmental Protection Agency for funding immediately. The funding of Step 3 will follow on a timely basis. The priority points (65) assigned by the Department for the Township should not change. The project will remain reachable for funding provided Federal monies are made available."

---

[3]The construction of federally financed waste treatment projects is generally accomplished in three Steps: Step 1, facilities plans and related elements; Step 2, preparation of construction drawings and specifications; Step 3, building of a treatment works. The award of grant assistance for each step is a separate project requiring separate approval by a state and by EPA.

28. No Step 2 grant application was prepared by Abington or by any other municipal entity immediately after Abington received said letter, notwithstanding the insights which were provided by DER to Abington therein.

29. On March 7, 1977, this Board entered an Adjudication in the Persky appeal wherein said appeal was dismissed and wherein we directed that Abington would have 13 months from the date of receipt of new bids in order to construct the Collector. This Adjudication was appealed to the Commonwealth Court of Pennsylvania by the Residents.

30. On May 3, 1977, the Commonwealth Court of Pennsylvania affirmed the action of the Court and on May 20, 1977, the Residents withdrew their appeal in the Commonwealth Court from our Adjudication in Persky.

31. On August 3, 1977, the litigation surrounding the Collector having been terminated, Abington again solicited bids for the construction of the Collector and received only one bid, in the amount of $915,092.50.

32. Since only one bid was submitted, Abington reinvited bids and on October 13, 1977, two bids were submitted, the low bid being $978.308.00.

33. At this time, Abington attempted to pursue several additional avenues of obtaining federal funds for the Collector prior to awarding bids and commencing construction of thereof.

34. By letter dated October 14, 1977, Abington made application to EPA for funding of the Collector pursuant to 40 CFR §35.925-18(b) (the "advance approval regulation") as part of the Central Pennypack sewerage project.

35. The advance approval regulation permits advance authorization to construct "a minor portion of a treatment works" prior to the award of a grant for the overall project, under certain circumstances as set forth therein.

36. Abington had intended to award a contract to construct the Collector to the low bidder at a meeting of the Abington Commissioners on November 16, 1977, but delayed the award pending a response to its October 14, 1977, request to EPA.

37. The conclusion of DER that a spray irrigation system was the most cost effective treatment alternative for the sewage generated in the watershed of Pennypack Creek was incorporated in a document entitled "Conclusions - Waste Water Management Study of the Central Pennypack" (Pennypack Conclusions) which was released on November 15, 1977.

38. Shortly after the Pennypack Conclusions were released, LTMA, Lower Moreland Township and Upper Moreland Township filed appeals to this Board from said Conclusions (Pennypack Appeals).

39. By letter dated November 28, 1977 to counsel for Abington, Maxine Woelfling, an Assistant Attorney General employed by DER, expressed the concern of DER that Abington may not have been proceeding

expeditiously to comply with the Order of DER, upheld by this Board, to construct the Collector whether or not it received favorable responses to its inquiries regarding federal funding.

40. By letter dated December 1, 1977, counsel for Abington responded to the November 28, 1977, letter from Attorney Woelfling and indicated that although Abington had applied for federal funds, it did "not intend to wait any longer than this month (December) for an award".

41. The request of Abington to EPA under the advance approval regulation was denied by letter dated December 8, 1977 from the EPA regional Administrator, Region III, for the reason that the Collector was not a minor portion of the Central Pennypack Sewerage project.

42. At the suggestion of EPA that funding of the Collector should properly be pursued through a "treatment works segment" grant [4] in connection with the Central Pennypack sewerage project or an amendment to the Sandy Run Grant, counsel for the Township wrote DER a letter on

---

[4]The term "treatment works segment" may be any portion of an operable treatment works described in an approved facilities plan, under 40 CFR § 35.17, which can be identified as a contract or discrete subitem or subcontract for Step 1, 2, or 3 work. 40 CFR §35.905. There are circumstances under which a grant for the construction of a treatment works segment can be awarded even though there is no approved facilities plan. These circumstances will be discussed later in this Adjudication.

December 13, 1977, wherein Abington requested that DER certify the Collector for federal funding as either a "treatment works segment" of the Central Pennypack sewerage project, or in the alternative, as an amendment to the Sandy Run Grant.

43. On December 14, 1977, subsequent to the filing of the Pennypack Appeals, DER returned the 1973 Interceptor Application to Abington and LMTA and the Spray Irrigation Application was returned to BABA.

44. Also subsequent to the filing of the Pennypack Appeals DER submitted to EPA the fiscal 1978 construction grant priority list awarding the Central Pennypack Watershed Quality Management Area (including the Township, Bryn Athyn Borough and Lower Moreland Township as a single area) 72 priority points for Step 2 funding.

45. On January 6, 1978, DER denied the requests for certification immediately above described. The reasons for this denial were set forth in a letter from C. T. Beechwood, the Regional Sanitary Engineer in the Norristown Regional Office of the Bureau of Water Quality Management of DER, in which it is provided, as follows:

> "This will acknowledge your letter dated December 13, 1977 and confirm my telephone conversation with you on December 23, 1977, regarding your request on behalf of Abington Township for advance approval of the construction of collecter sewers in the Washington Lane/Rydal area.

We cannot recommend advance approval for the construction of the Collector sewers system for this project.

We cannot consider the Collectors as a "treatment work segment" within 40 CFR §35.905-24 as it is not described in an approved facilities plan. Concerning your reference to our June 28, 1976 letter, no conditions of said letter are applicable at this time. Section 35.905-24 in itself has nothing to do with advance approval for construction and is not applicable.

Similarly we cannot consider the Collectors sewer as an amendment to the outstanding Sandy Run Treatment grant as this would involve a change in scope that would be inconsistent with our policy. Furthermore Pennsylvania has virtually no monies available for change in scope projects.

Forty CFR §35.925-18(b) is the section of the federal regulations to consider for advance construction which was commented upon by the EPA letter dated December 8, 1977."

46. Abington prepared but did not file written applications for a treatment works segment grant and for an amendment to the Sandy Run Grant with DER; if such applications would have been filed they would have been rejected by DER.

47. This denial by DER, of January 6, 1978, is the subject of the instant Appeal.

48. The Pennypack Appeals were thereafter amended to encompass and challenge the return of said 1973 Applications by DER and Abington intervened in said appeals in alignment with Appellants therein.

49. The Pennypack Appeals were dismissed by this Board by Order dated June 29, 1978 upon consideration of motions to dismiss filed by DER and BABA.

50. DER has $11,000,000.00 in reserve for grant amendments for fiscal year 1977.

51. The total allocation of federal funds for waste treatment project grants to Pennsylvania for fiscal year 1978 was $196,000,000.00

52. The said $11,000,000.00 was not specifically obligated on the date when DER refused to approve the grant amendment which Abington requested.

53. At the time when DER refused to approve the grant amendment which Abington requested, which involved a change in the scope of the Sandy Run Grant, DER had a general policy of refusing to approve change in scope grant amendment requests.

54. Notwithstanding the various appeals which were still pending at the time, on January 20, 1978, Abington issued a notice that the contractor the bid of whom it had earlier accepted, should proceed with the construction of the Collector.

55. The Collector was completely constructed and, for all intents and purposes, ready for service in December, 1978.

56. Abington could have acted a great deal more promptly in officially articulating its request for federal grant funding for this Collector.

We make the following additional Findings of Fact based upon a post-hearing stipulation into which the parties hereto entered on August 31, 1979.

57. An appeal to the Commonwealth Court was taken from our dismissal of the Pennypack Appeals.

58. By agreement dated May 29, 1979, Abington,Lower Moreland Township, LMTA, Bryn Athyn Borough and BABA entered into an Inter-municipal Planning Agreement(IPA) for the purpose, inter alia, of submitting a grant application to complete the development of a facilities plan for the Central Pennypack Creek drainage basin and to establish a definite procedure for completing such facilities plan.

59. By Memorandum dated May 26, 1979, said municipal entities approved as to the form of an agreement (the "Step 2 - Step 3 Agreement") for the design and construction of such facilities as may result from the facilities planning process subject to certain conditions contained in the Memorandum.

60. On June 1, 1979, LMTA, on behalf of said municipal entities submitted to DER an application for a Step 1 federal grant entitled "Central Pennypack Watershed Area Facilities Planning Study" ("Step 1 Grant Application"), which contained, inter alia, a schedule for the completion of the facilities plan.

61. DER participated along with said municipal entities in the negotiations leading up to the execution of the IPA, the Step 1 Grant Application, and the Step 2- Step 3 Agreement, and on August 3, 1979, certified the Application to EPA, which has already advised said municipal entities of its conceptual approval thereof.

62. The aforementioned Commonwealth Court Appeals were withdrawn by Abington, Lower Moreland Township and LMTA by Praecipe to Discontinue Appeal filed with the Commonwealth Court on or about July 20, 1979.

DISCUSSION

If anything can be said to be clear, given the problems which have pervaded the entire effort to provide effective sewage treatment in the Central Pennypack Creek Drainage Basin, it is clear that it was crucial that the Collector be constructed.

It appears to this Board that Abington should have, long before its request of December 13, 1977, made a determined effort to find a vehicle through which federal funding for the construction of the Collector could have been secured.

Although Abington realized, as early as 1971, that it was necessar for the Collector to be constructed, it did not choose to include the Collector in the March, 1973, Interceptor Application. It was stipulated by the parties to this Appeal that the reason why the Collector was not so included was that the residents of the area wherein the Collector was to be located opposed its construction. We have found that the other reason for such non-inclusion was that the engineering consultants of Abington were uncertain, in March, 1973, that the Collector was eligible for federal funding.

We suspect that the decision by Abington not to include the Collec in the March, 1973, Interceptor Application was wrong, or at least

misguided. Although there was citizen opposition to the construction of the Collecter at that time, it seems that Abington should have risked the consequences of the wrath of those citizens as against the prospect of losing federal funding for so costly a project as the Collector.

Even though it turned out that EPA refused to approve the Interceptor Application for funding because it conflicted with the Spray Irrigation Application, we believe that Abington would have been in an excellent position to have determined the prospects for success in its effort to secure federal funding for the Collector if Abington would have caused DER and EPA to be placed in a position, as early as 1973, where both agencies would have been required to evaluate an application in which the Collector was included.

Although we are well aware of the fact that the entire effort to provide effective sewage treatment in the Central Pennypack Creek Drainage Basin was still mired in the litigation brought by the Residents on June 28, 1976, the date when DER advised Abington that the Collector could be included in a Step 2 application for federal funding for a Central Pennypack Sewerage Project, and although we are also aware that DER had not finally chosen the spray irrigation alternative for such overall project at that time, we can, at the very least, speculate that Abington should have engaged in an all out effort to "take DER at its word" by delivering a Step 2 grant application which included the Collector to DER for review.

We can also venture the view that the Residents would have co-operated in this effort, given the opportunity for Abington to secure seventy-five percent federal funding for the Collector as against the then distinct possibility of sewer assessment and increased municipal indebtedness.

Notwithstanding our belief that Abington should have definitely acted more promptly in this matter, we do not hold that the failure by Abington to take action to secure a federal grant for the Collector earlier than October 14, 1977, the date when Abington sought funding under the advance approval regulation was necessarily fatal. This is for the reason that at that time, and on December 13, 1977, the date when Abington asked DER to certify the Collector for federal funding as either a treatment works segment of the Central Pennypack Sewerage Project, or, in the alternative, as an amendement to the Sandy Run Sewage Treatment Plant grant, it was probably still possible for such a certification to be made through some vehicle.

We deal, first, with the denial of the request that DER certify th Collector as a treatment works segment of the Central Pennypack Sewerage Project. As we have noted, infra, a treatment works segment is defined in 40 CFR §35.905 as "any portion of an operable treatment works described in an approved facilities plan, under §35.917, which can be identified as a contract or discrete subitem or sub-contract

for Step 1, 2, or 3 work. Completion of construction of a treatment works segment may, but need not, result in an operable treatment works."[5]

As the basis for its denial of the request for certification of the Collector as a treatment works segment of the Central Pennypack Sewerage Project, (segment denial) DER relied solely on the theory that since there was no approved facilities plan in which such segment was described at the time, the Collector could not be certified.

Counsel for Abington has consistently contended that DER erred in its reliance upon that theory. Counsel for Abington contended that in 40 CFR §35.917 (d) there was contained a provision applicable to a treatment works which will be a component part of a complete waste treatment system, (a fact which we have found to be true as to the Collector) under the terms of which the need for an approved facilities plan is obviated.

In that Section, 40 CFR §35.917 (d), it was provided, as follows"

> "Grant assistance for Step 2 or 3 may be awarded prior to approval of a facilities plan for the entire geographic area to be served by the complete waste treatment system of which the proposed treatment works will be an integral part if the Regional Administrator determines that applicable statutory requirements

---

[5]The version of the above quoted definition, which was in force on December 13, 1977, was contained in 40 CFR § 35.905.24. The earlier version was not materially affected by that which is contained in the newer section.

have been met (See §35.925-7 and §35.925-8); that the facilities planning relevant to the proposed Step 2 or 3 project has been substantially completed; and that the Step 2 or 3 project for which grant assistance is made will not be significantly affected by the completion of the facility and will be a component part of the complete system: Provided that the applicant agrees to complete the facilities plan on a schedule the State accepts (subject to approval by the Regional Administrator), which schedule shall be inserted as a special condition in the grant amendment."[6]

In 40 CFR §35.925-7, it is provided as follows:

§35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of §35.920-3 have been met. He shall also determine the following:

.
.
.
.

§35.925-7 Design.

That the treatment works design will be (in the case of projects invqlving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in §35.930-4, achievement of applicable effluent limitations established under the Act, or BPWTT (see §35.971-1(d)(5)), including consider-

---

6 The version of 40CFR §35.917(d) which is currently in force is almost identical to the above-quoted version and does not affect the meaning thereof.

ation , as appropriate, for the application of technology which will provide for the reclaiming for recycling of water or otherwise eliminate the discharge of pollutants:

(c) The sewer system evaluation and rehabilitation requirements of §35.927; and

(d) The value engineering requirements of §35.926 (b) and (c)."

In 40 CFR §25.925-8, it is provided as follows:

"§35.925-8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2 + 3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of Part 6 of this chapter, as part of facilities planning, in accordance with §35.917-1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with Part 6 of this chapter (particularly §§6.108, 6.200, 6.212, and 6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 if step 3 grant assistance of the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator."

In the post-hearing brief filed on behalf of DER on July 24, 1979, counsel agreed that DER had erred when it issued the segment denial without considering the provisions in 40 CFR §25.917(d). However, counsel contended that the existence of such error should not be the basis for this Board to sustain the segment phase of the instant appeal because Abington had not met all of conditions for grant approval for this Collector as a treatment works segment as set forth in 40 CFR §35.917(d). Counsel contended that: A. Abington had not met the requirements contained in 40 CFR §35.925-7, and in 40 CFR §25.925-8; B. Abington had not substantially completed facilities planning for the Collector; C. Abington had not and could not agree to complete the facilities plan for the entire Central Pennypack Sewerage Project on a schedule acceptable to DER. Counsel for DER also contended that even if DER could certify the Collector for federal funding as a treatment works segment of the Central Pennypack Sewerage Project, such certification would be meaningless because the Collector is now completely constructed and, under the provisions contained in 40 CFR §35.903(g), no grant assistance can be made under such circumstance.

In a letter which counsel for DER wrote to this Board dated August 30, 1979, it was stipulated that DER was abandoning its segment denial supportive argument that the facilities plan for the entire Central Pennypack Sewerage Project on a schedule acceptable to DER was not completed. This by reason of the existence of the facts set forth in our Findings of Fact Nos. 60 and 61, infra.

It is the present position of DER that its segment denial was a proper action because: A. Abington did not satisfy the above-described cost-effectiveness and environmental assessment requirements in 40 CFR §§35.925-7 and 35.925-8; B. Adequate facility planning for the Collector has never been obtained; and, C. Its segment denial must now be considered as proper because Abington, having completed the Collector, cannot, under any circumstances, be eligible for any grant assistance for the Collector.[7]

We reject the arguments of DER as they relate to 40 CFR §§ 35.925-7 and 35.925-8, and as they relate to facilities planning. DER obviously was satisfied that the design, size and capacity of the Collector were cost effective and related directly to the needs to be served by the Collector or DER would never have (1) approved the application by Abington for a permit to construct and operate the Collector; (2)ordered the Collector to be constructed (3) vigorously defended the attack on the validity of said Order that said Collector be constructed in Persky, supra (4) indicated that the Collector would have been funded as a part of a Step 2 grant for the Central Pennypack Sewerage Project in its June 28, 1976 letter to Abington

---

[7]Although DER has abandoned its contention that the segment denial was proper by reason of the fact that Abington had not, as of December 13, 1977, agreed to complete the facilities plan for the entire Central Pennypack Sewerage Project on a schedule acceptable to DER, we would have found no evidence that such a contention was improper and we note that we would have seen no reason to find fault with DER with regard to such lack of agreement.

(5) "pushed" Abington to construct the Collector in its November 28, 1977 letter to counsel for Abington. We also believe, for the same reasons, and for the additional reason that this Collector is an integral part of the Central Pennypack Sewerage Project which DER considers as a crucial environmental protective facility, that there has been an adequate assessment of expected environmental impacts of tl Collector and that DER is well satisfied that the environmental benefi therefrom outweigh any environmental detriments.

DER contends, finally, with regard to the correctness of its segment denial, that because Abington had completed construction of the Collector, Abington is barred from eligibility for any grant assistance therefor. In support of this contention, DER directs our attention to the provisions contained in 40 CFR §35.903 (g). In this Section it was provided as follows:

> "If initiation of step 1, 2, or 3 construction (see §35.905-4) has occurred prior to award of grant assistance, costs incurred prior to the approved date of initiation of construction will no be paid and award will not be made except under the circumstances, set forth in §35.925-18"

In 40 CFR §35.925-18 it was provided, as to the initiation of Step 3 construction prior to grant award, as follows:

"§35.925 Limitations on award.

> Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable

requirements of §35.920-3 have been met. He shall also determine the following:

That project construction has not been initiated prior to the approved date of initiation of construction (as defined in §35.905-4), except as otherwise provided in this section. Generally, payment is not authorized for costs incurred prior to the approved date of initiation of construction, which shall be established in the grant agreement, in accordance with paragraphs (a), (b), and (c) of this section.

(a) Steps 1 or 2:

(1) No prior approval or prior grant award is required for Step 1 or Step 2 work initiated prior to November 1, 1974; payment for all such allowable cost incurred after the approved date of initiation of construction is authorized in conjunction with the first award of grant assistance.

(2) In the case of Step 1 or Step 2 project work initiated after October 31, 1974, no payment is authorized for:

(i) Step 1 costs incurred prior to the date of approval of a plan to study (see §35.917 and 35.930-3 (a)(1); and

(ii) Step 2 costs incurred prior to the date of approval of a facilities plan (see §§35.917 and 35.930-3 (b)(1); payment for all Step 1 or Step 2 costs incurred after such dates of approval are authorized in conjunction with the first award of grant assistance.

(3) Where Step 1 or Step 2 project work is initiated after June 30, 1975, no grant assistance for the Step 1 or Step 2 project work may be awarded unless such award precedes initiation of the project work: Provided, that in lieu of award of a Step 1 grant after June 30, 1975, the State Agency may request the Regional Administrator to reserve funds for Step 1 grant assistance (based upon approval of the plan of study) and to defer award of award of grant assistance for Step 1 work, wh

award, however, must in any event be made within the allotment period for the reserved funds.

(b) Step 3: Except as otherwise provided in this subparagraph, no grant assistance for a Step 3 project may be awarded unless such award preceeds initiation of the Step 3 construction. Advance acquisition of major equipment items requiring long lead times, or advance construction of minor portions of treatment works, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator but only (1) if the applicant submits a written and adequately substantiated request for approval, and (2) if written approval by the Administrator is obtained prior to initiation of the advance acquisition or advance construction.

(c) The approval of a plan of study, a facilities plan, or of advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested prior to grant award (see §35.945(a)). In instances where such approval is obtained, the applicant proceeds at its own risk, since payment for such costs cannot be made unless and until grant assistance for the project is awarded."

Since the Collector has been completed and since none of the exceptions set forth in 40 CFR §35.925-18 are applicable, it appears, on the surface, that Abington is not entitled to grant assistance for the Collector by reason of the provisions contained in 40 CFR §35.903(g), supra.

Abington strenuously agrues, given that DER erred in issuing the segment denial, given the fact that it was environmentally necessary to construct the Collector, given the tortuous history of this entire matter and given that DER was "pressuring" Abington to construct the Collector, that it had no choice but to proceed with construction in advance of the possibility of a grant.

Abington argues that it should have the opportunity to explain its dilemma to EPA and to have that agency, rather than DER or this Board, decide whether, under the circumstances, Abington may receive funds for this construction. Abington has directed our attention to the provisions contained in 40 CFR §§30-1000 - 30-1000-3, inclusive, as authority for this contention. In those sections, it is provided as follows:

"§30.1000 General

The Director, Grants Administration Division, is authorized to approve deviations from substatutory requirements of this subchapter or grant related requirements of this chapter when he determines that such deviations are essential to effect necessary grant actions or EPA objectives where special circumstances make such deviations in the best interest of the Government.

§30.1000-1 Applicability.

A deviation shall be considered to be any of the following:

(a) When limitations are imposed by this subchapter or by grant related requirements of this chapter upon the use of a procedure, from, grant clause, or any other grant action, the imposition of lesser or greater limitations,

(b) When a policy, procedure, method or practice of administering or conducting grant actions is prescribed by this

subchapter or by grant related requirements of this chapter, any policy, procedure, method, or practice inconsistent therewith,

(c) When a prescribed grant clause is set forth verbatim in this sub chapter, use of a clause covering the same subject matter which varies from, or has the effect of altering, the prescribed clause or changing its application,

(d) When a limitation on award or grant condition is set forth in this subchapter but not for use verbatim, use of a special condition covering the same subject matter which is inconsistent with the intent, principle, or substance of the limitation or condition, or related coverage of the subject matter,

(e) Omission of any mandatory grant provision,

(f) When an EPA or other form is prescribed by this subchapter, use of any other form for the same purpose or

(g) Altera'ion of an EPA or other form prescribed in this subchapter.

§30.1000-2 Request for deviation.

A request for a deviation shall be submitted in writing to the Director, Grants Administration Division, as far in advance as the exigencies of the situation will permit. Each request for a deviation shall contain as a minimum:

(a) The name of the applicant or the grantee and the grant identification number of the application or grant affected, and the dollar value,

(b) Identification of the section of this subchapter or the grant related requirements of this chapter from which a deviation is sought,

(c) An adequate description of the deviation and the circumstances in which it will be used, including any pertinent background information which will contribute to a fuller understanding of the deviation sought, and

(d) A statement as to whether the same or a similar deviation has been requested previously, and if so, circumstances of the previous request.

§30.1000-3 Approval of Deviation.

Deviations may be approved only by the Director of the Grants Administration Division or his duly authorized representative A copy of each such written approval shall be retained in the official EPA grant file. Concurrence in the approval of the deviation by the appropriate Assistant Administrator(s) is required prior to its effectiveness, where the deviation would involve more than a unique, special situation, e.g:, will affect grantees as a class."

We are convinced that DER erred when it issued its segment denial to Abington on January 6, 1978.

We are less sure that such error by DER is the cause for the dilemma in which Abington has been placed.

It is improper and unfair for Abington to place all the blame for the existence of this dilemma on DER. If, as we suggested earlier in this Adjudication, Abington had been a great deal more prompt in bringing the official attention of DER to a request that it certify the Collector for funding, Abington might already have received the grant assistance which it needs or, at the very least, Abington would have been in a position where it could have received valuable insight into the proper manner in which to proceed towards such grant assistance.

Nevertheless, we are willing to provide the vehicle by which Abington may make its request for deviation to EPA under the provisions contained in 40 CFR §§ 30.1000 - 30.1000-3, supra. Our willingness so to do is based upon the great confusion which has existed in this entire matter and upon the fact that DER did err in this matter. We clearly do not have the right to grant the relief which has been requested. It is the duty of EPA, and not this Board, to decide the ultimate question of whether Abington is deserving of relief. See, e.g. City of New York v. Diamond, 379 F. Supp. 503 (S.D.N.Y. 1974).

The manner in which this Board will permit this process to begin is by remanding this matter to DER with a direction that it certify the Collector as a treatment works segment to the Central Pennypack Sewerage Project with fundable priority. It will be our direction that in so certifying this collector DER should create for Abington no further impediment to EPA approval other than that which has already been created as the result of the fact that Abington has already completed construction of the Collector, an impediment which Abington will attempt to convince EPA should be cleared.

We now deal with the issue of whether DER erred when it refused to approve the construction of the Collector as an amendment to the grant to upgrade the Sandy Run Sewage Treatment Plant. (Sandy Run Grant).

Earlier in this Adjudication we indicated our belief that Abingto was either wrong or misguided when it failed to formally request grant assistance for the construction of the Collector prior to October, 1977.

It would appear that Abington was again wrong when it failed to include the Collector in its application for the Sandy Run Grant. We have found, based upon the testimony of a DER official given at the hearing on this Appeal that DER would, at the very least, have seriously considered the inclusion by Abington of the Collector in this application. Certainly it could not have been more difficult for DER to certify the Collector for federal funding as an original part of the Sandy Run Sewage Treatment Plant upgrading project in 1974 than it was for DER to consider, in late 1977, the construction of the Collector as approvable for federal funding as an amendment to the grant for such upgrading which Abington received.

Notwithstanding this belief, we will direct our attention to the regulations in which grant amendments are discussed to determine whether DER was correct in its conclusion that this grant amendment could not be approved.

In 40 CFR §35.955, it was provided as follows:

"§35.955 Grant amendments to increase grant amounts.

Grant agreements may be amended under §30.900-1 of this chapter for project changes which have been approved under §§ 30-900 and 35.935-11 of this subchapter. However, no grant agreement may be amended to increase the amount of a grant unless the State agency has approved the grant increase from available State allotments and reallotments under §35.915."

In 40 CFR § 30.900-1, it was provided as follows:

§30.900-1 Formal grant amendments.

(a) Project Changes which substantially alter the cost or time of performance of the project or any major phase thereof,

which substantially alter the objective or scope of the project, or which substantially reduce the time or effort devoted to the project on the part of key personnel will require a formal grant amendment to increase or decrease the dollar amount, the term, or other principal provisions of a grant. This should not be constructed as to apply to estimated payment schedules under grants for construction of treatment works.

(b) No formal grant amendment may be entered into unless the Project Officer has received timely notification of the proposed project change. However, if the Project Officer determi that circumstances justify such action, he may receive and act upon any request for formal grant amendment submitted (1) prior to final payment under grants for which payments of the Federal share have been made by reimbursement and (2) prior to grant closeout of other grants. Formal grant amendments may be executed subsequently only with respect to matters which are the subject of final audit or dispute appeals.

(c) A formal grant amendment shall be effected only by a written amendment to the grant agreement. Such amendments shall be bilaterally executed by the EPA grant award official and the authorized representative of the grantee. However, in cases where this Subchapter or the grant agreement give the government a unilateral right (for example, the suspension or termination, rights set forth in §§30.915 and 30.920, the withholding of grant payment pursuant to §30.615-3, or the reduction of the grant amount pursuant to §35.559-3 of this Subchapter), any such right may be exercised by the appropriate EPA official (generally, the grant award official) in accordance with this Subchapter.

(d) The grants administration office shall prepare all formal grant amendments after approval of the modification by the Project Officer or Grant Approving Official, as appropriate.

In 40 CFR §30.900, it was provided as follows:

§30.900 Project changes and grant modifications.

(a) A grant modification means any written alteration in the grant amount, grant terms or conditions, budget or project period, or other administrative, technical, or financial agreement whether accomplished by unilateral action of the grantee or the Government in accordance with a provision of the grant agreement or this Subchapter, or by mutual action of the parties to the grant.

(b) The grantee must promptly notify the Project Officer in writing (certified mail, return receipt requested) of events or proposed changes which may require grant modification, such as:

(1) Rebudgeting (see §30.610);

(2) Changes in approved technical plans or specifications for the project;

(3) Changes which may affect the approved scope or objective of a project;

(4) Significant changed conditions at the project site;

(5) Acceleration or deceleration in the time for performance of the project, or any major phase thereof;

(6) Changes which may increase or substantially decrease the total cost of a project (see §30.900-1); or

(7) Changes in the Project Director or other key personnel identified in the grant agreement or a reduction in time or effort devoted to the project on the part of such personnel.

(c) Grant modifications are of four general types: formal grant amendments, administrative grant changes, transfer of grants and change of name agreements, and grantee project changes (see §30.900-1 through §30.900-4).

(d) A copy of each document pertaining to grant modifications or requests therefor (any administrative change, approved or disapproved project changes and any letter of approval or

disapproval, grant amendment, or agreement for transfer of a grant of change of name agreement) shall be retained in the official EPA grant file.

(e) The document which effects a grant modification shall establish the effective date of this action. If no such date is specified, then the date of execution of the document shall be the effective date of the action.

In 40 CFR §35.935-11, it was provided as follows:

"§35.935-11 Project changes.

In addition to the notification of project changes required pursuant to §30.900 of this chapter, prior approval by the Regional Administrator and the State agency is required for proje changes which may (a) substantially alter the design and scope of the project, (b) alter the type of treatment to be provided, (c) substantially alter the location, size, capacity, or quality of any item of equipment; or (d) increase the amount of Federal funds needed to complete the project: Provided, That prior EPA approval is not required for changes to correct minor errors, minor changes, or emergency changes. No approval of a project change pursuant to §35.900 of this chapter shall commit or obligate the United States to any increase in the amount of the grant of payments thereunder unless a grant increase is approved pursuant to §35.955. The preceding sentence shall not preclude submission or consideration of a request for a grant amendment pursuant to §30.900-1 of this chapter."

In 40 CFR §35.915(g), it was provided, at all times applicable to this matter, as to reserves for grant increases, as follows:

"(g) Reserve for grant increases. In developing the project priority list the State must make provision for grant increases for projects awarded grant assistance under this subpart . A reasonable portion, not less that five percent, of each allotment for fiscal year 1975 and later years made pursuant to §35.910 shall be reserved for grant amendments to increase grant amounts pursuant to §35.953-11 and 35.955. A statement specifying the amount to be reserved for grant amendments shall be submitted by the State with the project priority list. The reserve period must be for not more than eighteen months after the date of such allotment. If any of the reserved amount remains, this amount may be utilized for the funding of additional projects, in accordance with the procedures set forth in paragraph (e) of this section.

(h) Grant increases. The Regional Administrator may approve a grant increase, upon application by the grantee, and upon written confirmation by the State for each application, that the grant increase is justified. The grant increases will be made from the amount reserved, by the State, for that purpose, from currently available allotments pursuant to paragraph (g) of this section.

(i) Reserve for Step 1 and Step 2 Projects. In developing the project priority list, the State may (but need not) make provision for an additional reserve for grant assistance for Step 1 and Step 2 projects whose selection for funding will be determined by the State agency subsequent to approval of the project list. A reasonable portion, but not more than ten percent, of each allotment for fiscal year 1975 and later years made pursuant to §35.910 may be reserved for this purpose. A statement specifying the amount to be reserved for such grant assistance shall be submitted by the State with the project

priority list. The reserve period may be for not more than eighteen months after the date of such allotment. If any of the reserved amount remains, this amount may be utilized for the funding of additional projects, in accordance with the procedures set forth in paragraph (e) of this section. The funding of Step 1 and Step 2 projects from this reserve should be consistent with the approved State strategy and should be developed in conjunction with, but need not rigidly follow, the ranking in the municipal discharge inventory."

In its denial of the request by Abington for approval of the construction of the Collector as an amendment to the Sandy Run Grant, DER found that such a request involved a change in scope of said upgrading project which would be inconsistent with its policy.

As we have seen, under the provisions contained in 40 CFR §35.915 (g), DER was obliged to reserve not less than five percent of its fiscal year grant allotment in each fiscal year for grant amendments to increase grant amounts.

The only apparent direction given in said regulations to the states in regard to standards by which to judge requests for grant amendments is the statement contained in 40 CFR §35.915 (h) that the State was required to provide written confirmation that the grant increase requested is "justified".

In its denial of the request by Abington for approval of the construction of the Collector as an amendment to the Sandy Run Grant, DER did not address itself to whether a grant increase for the Collector was "justified". In view of the necessity for the construction of the Collector and an apparent policy of DER to

favor grant assistance for such a project, it is difficult to believe that DER would have found lack of justification for such increase.

It appears that it may have been the policy of DER, with certain exceptions indicated by a DER witness, to create a "reserve within a reserve", for cost overruns only, and to reject, out of hand, requests for grant amendments involving a change in scope.

We believe that in developing such a "policy", DER failed to properly consider the federal regulations relating to grant amendments. There is nothing in those regulations which leads this Board to conclude that the states were free to establish and implement a policy wherein any request for a grant amendment which involved a change in scope was excluded from consideration for approval. We hold that such a policy was arbitrary and without regulatory foundation.

As a second reason for such grant amendment denial, DER stated that Pennsylvania had virtually no monies available for change in scope projects. We agree with DER that given requests for more dollars for grant amendments than were reserved therefor, DER had the right, by sheer necessity, to disapprove some grant amendment requests.

At the time when Abington made its request for said grant amendment, DER had $11,000,000.00 in reserve for grant amendments and it was about to be in a position where it was obliged to allocate at least five percent of the allocation for fiscal year 1978, said total allocation being $196,000,000.00. A witness for DER testified that said $11,000,000.00 was insufficient to take care of cost overruns and that the $196,000,000.00 was earmarked for the

1978 fiscal year project priority list.

We are convinced that this alleged unavailability of said $11,000,000.00, which funds were, according to said witness, still unobligated as of January 6, 1978, was a reflection of the arbitrary, exclusionary policy of DER against change in scope grant amendments.

For these reasons, we hold that DER wrongfully refused to approve the Collector as an amendment to the Sandy Run Grant. We will remand this second phase of this Appeal to DER with a direction that it approve said grant amendment. All that we said earlier in this Adjudication with regard to the lack of promptness by Abington and with regard to the eventual necessity by EPA to determine whether it should approve said grant amendment in view of the fact that the Collector had already been completed is as applicable to this phase of this Appeal as it was to the segment denial phase hereof.

We will assume, by reason of the fact that it was EPA which suggested that Abington seek funding of this Collector as an amendment to the Sandy Run Grant, that the failure of Abington to give formal notice of such request to EPA will not be a problem in this matter. However, that issue would be in EPA for resolution.

CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this Appeal.

2. This Board has jurisdiction to determine whether DER committed error in its consideration of federal regulations which apply to the awarding of federal grant assistance to Pennsylvania municipalities for wastewater treatment works.

3. DER committed error when it refused to certify the Collector as a treatment works segment to the Central Pennypack Sewerage Project.

4. DER committed error when it refused to approve the Collector as an amendment to the Sandy Run Grant.

5. This Board does not have jurisdiction to determine whether EPA should now fund the Collector, given that it has been fully constructed. Jurisdiction to decide that issue is in EPA.

6. DER should, upon remand by this Board, certify the Collector as a treatment works segment to the Central Pennypack Sewerage Project and approve the Collector as an amendment to the Sandy Run Grant.

O R D E R

AND NOW this 17th day of October, 1980, the Appeal of Abington Township is sustained. It is Ordered that this entire matter is remanded to the Department of Environmental Resources. The Department of Environmental Resources is directed to certify to the United States Environmental Protection Agency a Collector sewer which was constructed by or on behalf of Abington Township to service the Washington Lane/Rydal area of said Township as entitled to fundable priority for federal grant assistance which is allocated under the "Clean Water Act". It is further Ordered that the Department of Environmental Resources is directed to approve said Collector sewer as an amendment to an existing grant made by the United States Environmental Protection Agency for the upgrading of the Sandy Run Sewage Treatment Plant. It is further Ordered that the Department of Environmental Resources shall proceed with such certification and with such approval in an expeditious manner.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS, Chairman

Thomas M. Burke

THOMAS M. BURKE, Member

Dennis J. Harnish

DENNIS J. HARNISH, Member

Date: October 17, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DARBY CREEK JOINT AUTHORITY, et al. :

:

: Docket No. 80-076-W
: 25 Pa. Code §94.11, 54,42

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NEWTOWN TOWNSHIP, Permittee

ADJUDICATION

By: Paul E. Waters, Chairman, November 10, 1980

This matter comes before the Board as an appeal from the issuance of a permit by DER to extend public sewer lines in the Elgin Park area of Newtown Township, Delaware County, Pa. to the sewer system served by Darby Creek Joint Authority and Radnor-Haverford-Marple Sewer Authority appellants herein. The portion of Newtown Township in question is experiencing sewage problems with its old on-lot septic systems and a health hazard has been created. The appellants, however, have not consented to treat the sewage from Newtown Township and Darby is having sewage problems of its own, in that one area of its sewer line surcharges during periods of heavy rain. Appellants contend that their refusal to consent to the sewer connection authorized by DER, and the fact that adding additional flows from Elgin Park can only make their present problems worse, require that we now revoke the permit issued to Newtown Township.

FINDINGS OF FACT

1. Appellants are Darby Creek Joint Authority (hereafter called "DCJA"), and Radnor-Haverford-Marple Sewer Authority located in Delaware County, Pa.

2. Water Quality Management Permit No. 2380402 was issued to Newtown Township Sewer Authority (hereafter called "Newtown") by the Department of Environmental Resources (hereafter called "DER") on March 27, 1980.

3. The appellant services the Darby Creek drainage area and the specific areas therein delineated by service agreements with all its member municipalities and with Radnor-Haverford-Marple Sewer Authority (hereafter called "RHM").

4. The area proposed to be serviced by Newtown is not within the service area of DCJA.

5. There is no agreement between RHM and DCJA or between RHM and Newtown, or between Newtown and DCJA for the servicing of the subject area in Newtown, and Newtown does not have the written approval of DCJA to connect.

6. The proposed service area in Newtown is not in the watershed of the area to be serviced by DCJA and is outside the service area delineated in the service agreement between RHM and DCJA.

7. Appellant has not contemplated, designed or made provision, with one exception, for servicing areas other than the Darby Creek Drainage Area as delineated in a service agreement between Appellant and RHM, dated September 1, 1968.

8. Appellant's interceptor is now, or may become, surcharged if the additional sewage flow from the area proposed to be serviced, and as covered by the subject Water Quality Management Permit, is imposed upon appellant.

9. Newtown does not have the approval of Darby to discharge into its sewer system.

10. Newtown does not have appellant's approval to discharge into RHM system and then into appellant's system.

11. Sewage emanating from the subject Newtown area must be pumped over to RHM sewer system.

12. The lines were surcharged on four different occasions, after rain storms, from 1976 to the present.

13. Any discharge from the subject Newtown area would place an additional volume of only 84,000 gallons per day into the present flow of 35 million gallons per day or an increase of 0.27% on the line.

14. The Elgin Park area to be served consists of 38 new homes and 250 existing homes.

15. The existing homes have old on-lot septic systems which are malfunctioning and they create a present health hazard.

16. Newtown failed to properly complete the application for the subject Water Quality Management permit on responding to Question G, under Section D of Module 1, by indicating erroneously "not applicable" to the question regarding whether there was a discharge to another permittee sewer system and treatment plant.

17. Newtown failed to properly complete Question No. 18 of Section A on Module 6 in its application by indicating that no agreement with another municipality was necessary when, in fact, it did intend to discharge into another municipality's sewer treatment plant.

18. Under 25 Pa. Code §94.12, 21, 22 DER requires sewage plant permittees to submit annual reports and to therein indicate where sewage flows exceed the hydraulic capacity of the facilities or is likely to, within the next five years and to submit a plan for correction if there is such a problem.

19. DER did not know the frequency, nature or extent of the surcharge problem which Darby now alleges has occurred in its facilities, and DER was not properly notified thereof.

20. On January 30, 1976, Newtown advised RHM of the serious health hazard from on-lot systems and requested further information and approval for

the discharge here at issue, to the Darby Creek Watershed and RHM lines.

21. On February 4, 1976, RHM advised Newtown that the engineering solution proposed was reasonable, but there were other problems that would have to be resolved before it could consent to the requested connection.

DISCUSSION

Newtown Township is faced with a dilemma. On the one hand there is a public health hazard in the Elgin Park area of the Township, due to on-lot sewage problems, and on the other, it has a permit to connect to a public sewer system with alleged insufficient capacity to presently serve its own needs, let alone the increased demand of the Township. Appellant Darby Creek Joint Authority never agreed to treat the increased sewage flow from the Township, and, in fact, has an agreement not with the Township but with the Radnor-Haverford-Marple Sewer Authority which contracted with Newtown to treat the sewage only from a specifically designated area[1]—which does not include the Elgin Park area of Newtown Township.

The parties seem to agree that DER did not have all of the facts in issuing the sewer extension permit here in question. Whether this was a mutual or unilateral mistake, whether of fact or law, the bottom line is that DER granted the permit despite the fact that Darby had been experiencing surcharge problems on a small part of its sewer lines since 1970. Although the surcharges are infrequent and occur during only some heavy rain storms it goes without saying that the increased flows from the Newtown Township Elgin Park area can only aggravate the present condition; unless other steps are taken to reduce infiltration.

While Darby argues that it is primarily concerned about the surcharge problem, the facts indicate that this has been a problem of *minor* concern for a decade. Darby has taken no steps to restrict or halt connections to its own system, nor has the Radnor-Haverford-Marple Authority been limited or restricted due to the surcharge

---

1. There are one or two houses which are served by Darby Creek Joint Authority but with these few exceptions the Authority limits the area served, to the Darby Creek watershed.

problem that now is urged upon us as a basis for revocation of Newtown's permit. The evidence indicates that the so called "surcharge problem" is not widespread, is infrequent[3] and seems to have been largely ignored until now.[4] The basic question we are called upon to decide is whether a Waste Management permit for a sewer extension connecting to a public system which is presently experiencing minor surcharge problems during periods of heavy rainfall, should be revoked notwithstanding the fact that the permit will allow a severe health hazard caused by malfunctioning on-lot systems, to be abated.

---

2. Apparently there was a required report filed with DER around 1975 which mentioned flow problems, but subsequent annual reports and more importantly, actions of Darby, do not reflect this concern.

3. There are only three or four incidents over a five year period during rain storms, when such surcharges were observed.

4. An engineer for Darby Authority testified (N.T. page 46 line 19-25 and N.T. page 47 lines 1-12).

> "Q Has DCJA submitted a plan to the Department setting forth the actions that will be taken to reduce the overload and provide the needed additional capacity for the line running from McDade Boulevard to the pumping station, which you have alleged to be surcharged?"
>
> "A The only plan that I am aware of is the one prepared in 1973."
>
> "Q No plan has been submitted of that nature in 1978 or 1979?"
>
> "A Not to my knowledge."
>
> "Q And no plan for limiting the connections to the sewage system during the term of the surcharge?"
>
> "A During the term — I don't understand that."
>
> "Q Has there been any plan submitted to the Department for limiting connections as long as the surcharging is occurring or for at least having some plan for limiting the total number of connections?"
>
> "A I don't have any knowledge of Darby Creek limiting connections to their system."

Although appellants acknowledge that Newtown does indeed have a health hazard problem in the Elgin Park area, they have made no effort to deal with the real question posed by these facts. By the same token, there is no dispute, that Darby has periodically had surcharges along a small portion of it's line. The parties have made their own case, with no regard to the real issue that the facts raise.

DER's regulations, of course, prohibit a sewer extension where the additional flows contributed to the sewage facilities from the extension will cause the plant, pump station, "or other portion of the sewer system to become overloaded" §94.11. We have upheld the validity of this provision in a number of cases.[5] However, in 25 Pa. Code 94.54 DER's regulations permit an exception to bans on sewer line extensions where necessary to eliminate public health hazards. The other regulation which we believe should be considered however is 25 Pa. Code 94.42[6] which indicates the special consideration DER must give to solving a health hazard sewage problem. Although these regulations are not directly on point we, nevertheless, believe they indicate that DER does bear a responsibility to take such steps as are reasonably necessary to abate health hazards in the face of a hyraudic overload of such minor significance as here.

---

5. §94.54. Sewer line extension.

"Exceptions to a ban are limited to those exceptions which do not require the extension of existing sewer lines, except as needed for the elimination of public health hazards or pollution or for facilities of public need."

6. §94.42. Priority of connections.

"The Department will not modify or remove a ban if the projected number of new connections may exceed the available capacity if the ban is modified or removed unless the person or municipality upon whom the ban is imposed presents a program, acceptable to the Department, for limited approval of connections in a manner which will prevent further overload. This program shall give priority to connections in the following order:

(1) the elimination of public health hazards;
(2) the elimination of pollution; and
(3) the connection of facilities of public need."

Although we are satisfied that RHM knew of the problem Newtown was having and was clearly advised of its role in the proposed solution, it is equally clear that neither RHM or Darby finally agreed to Newtown's sewage proposal,[7] which was authorized by DER.

Because of extenuating circumstances, including the fact that the sewage flow in question is de minimus, that a severe health hazard is to be remedied and the fact that each party,[8] including the appellants, must bear some of the blame for the unhappy present state of affairs, we will not revoke the permit.

At the same time, we cannot overlook completely the shortcomings of DER and permittee Newtown in this affair. It is clear that some further steps must be immediately taken to eliminate the occasional surcharge on which appellant Darby has relied in this proceeding. To this end, we deem it appropriate to remand the case to DER for the purpose of imposing such conditions as it deems necessary to resolve any Clean Stream Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* violations otherwise contemplated. We believe that Newtown must shoulder a fair share of any burden arising from such conditions, and that appellants must be given the opportunity to outline their needs with regard to such conditions.

CONCLUSIONS OF LAW

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

---

7. Newtown, furthermore, has a contradiction built into its case. Relying on the January 30, 1976 letter which it sent to RHM, stating that no approach had yet been made to DER, Newtown then proceeds to argue that it believed DER was totally in charge of such matters and no consent or information had to be obtained or given to RHM or Darby regarding "capacity or surcharging problems anywhere in the system."

8. It appears that RHM is the least blameworthy, in that all it did was, by silence, to allow Newtown to move ahead under the mistaken impression that, no news being good news, all was well.

2. Where a permit for sewer extension has been issued and it then appears that there is or may be a hydraulic overload on a small portion of a connecting facility, the Board will not revoke the permit, if the new extension is proposed to abate a severe health hazard.

3. While the existence of a severe health hazard created by on-lot sewage disposal systems may be a valid reason not to revoke a Water Quality Management permit, issued to solve the problem despite occasional surcharges, the matter will nevertheless be remanded to DER to impose appropriate conditions on the issuance of the permit, where the connection would otherwise be without the knowledge or consent of necessary parties.

O R D E R

AND NOW, this 12th day of November, 1980, the appeals of Darby Creek Joint Authority and Radnor-Haverford-Marple Sewer Authority are hereby dismissed. The cases are remanded to DER for further action consistent with this adjudication.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: November 12, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF JEFFERSON

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and FERN VALLEY INDUSTRIES

Docket No. 79-065-B

Pennsylvania Solid Waste Management Act

ADJUDICATION

By the board, November 26, 1980

This matter is before the board on an appeal by the Borough of Jefferson from an action of the Department of Environmental Resources (DER) granting a solid waste permit to Fern Valley Industries for the operation of a fly ash disposal site within the borders of Jefferson Borough, Allegheny County. The permit, issued under the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. 6001 *et seq.*, authorizes the disposal of fly ash and bottom ash from Duquesne Light Company's Elrama Power Station.

The stated reasons for the Borough's appeal can be summarized as follows: 1) The DER failed to insure that the disposal site would not have a detrimental impact on the surrounding environment, including degradation of the air and water, and thus the DER abused its discretion and abrogated its duties as trustee of the public natural resources of the Commonwealth under Article I,

Section 27 of the Pennsylvania Constitution; 2) The DER failed to provide notice of the pendency of the disposal operation permit application to Jefferson Borough and the citizens of Jefferson Borough through means other than publication in the Pennsylvania Bulletin and such lack of notice deprived appellant and its citizens of their due process rights under the United States Constitution; and 3) The DER violated the Pennsylvania Open Meeting Law, the Act of July 10, 1974, No. 175, 66 P.S. 261 *et seq.* by taking action authorizing the issuance of the disposal operation permit without a "duly advertised and convened public meeting or hearing" as defined by the Open Meeting Law.

Permittee, Fern Valley Industries was granted the status of a party appellee in this proceeding through the operation of Board Rule 21.51 which provides that the holder of a permit which is contested before this board is subject to the jurisdiction of the board as an appellee.

Two days of hearings were held on the merits of the appeal and post-hearing briefs have been filed by the parties.

FINDINGS OF FACT

1. Appellant is the Borough of Jefferson, a municipality in the County of Allegheny, Commonwealth of Pennsylvania.

2. Appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources, the agency authorized to administer the Pennsylvania Solid Waste Management Act, *supra*.

3. Appellee/permittee is Fern Valley Industries, a company having its offices at 60 Clover Drive, Apartment 62, Pittsburgh, PA 15236.

4. On or about October 6, 1975, U.S. Utilities Services Corporation submitted a Phase I application to the DER for a solid waste permit to dispose

of fly ash and bottom ash and certain sludge from the Duquesne Light Company's Elrama Power Station at a location along Pennsylvania Route 837, Jefferson Borough, Allegheny County.

5. Notice of USUS' Phase I submission was published in the Pennsylvania Bulletin on November 1, 1975.

6. On or about October 7, 1978 Fern Valley reactivated and updated the USUS Phase I application for the Fern Valley site. The Fern Valley application was for a solid waste permit to dispose of fly ash and bottom ash from Duquesne Light Company's Elrama Power Station.

7. Notice of Fern Valley's Phase II submission was published in the Pennsylvania Bulletin on October 7, 1978.

8. On May 3, 1979, the DER issued Solid Waste Permit No. 300615 to Fern Valley Industries for construction and operation of the fly ash and bottom ash disposal site.

DISCUSSION

The DER and Fern Valley raise for the first time in their post-hearing briefs the argument that appellant lacks standing to appeal the issuance of the DER permit. Their standing argument relies principally on the Commonwealth Court's recent decision in *Strasburg Associates v. Newlin Township*, ___ Pa. Commonwealth Ct. _____, 415 A.2d 1014 (1980). In *Strasburg*, the Court held that a municipality lacked standing to appeal from a DER action granting a permit for a solid waste disposal facility within its borders where it purported to protect the health, safety and general welfare of its citizens.

We have addressed this specific issue in three recent cases. The Commonwealth Court decision in *Strasburg* was a reversal of our decision in *Newlin*

Township v. DER and Strasburg Associates, EHB Docket No. 78-127-D (issued February 19, 1979) where we granted standing to Strasburg to appeal. It was our view that local government units should be able to challenge a DER action granting a permit because a municipality "could be called on as a last resort to remedy any threat to the public health, safety or welfare that might be created within its jurisdiction." The Commonwealth Court in its *Strasburg* decision held this reasoning to be in error. It opined that a municipality's interest in protection of resources and avoidance of nuisances, based on its possible responsibility for their abatement, was speculative.

Subsequent to *Strasburg*, and based directly on the holding stated therein, we have twice held that local government units do not have standing to challenge a permit for a waste disposal site because the interest to be protected is not a municipal function and a municipality cannot assert the interests of its citizens. See *Wayne J. Busfield, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 77-128-W (issued September 29, 1980) and *Franklin Township and County of Fayette v. DER, et al*, EHB Docket No. 80-090-B (Opinion and Order issued October 15, 1980).

Appellant, in a reply brief, argues that the instant case can be distinguished on the basis that in *Strasburg* the Court conditioned its decision upon a finding that the record below revealed that the transactions challenged by the municipality were subject to intense scrutiny by the DER, whereas here it is alleged that the DER failed to require sufficient information to allow for a proper review. We disagree with appellant's reasoning. A finding of standing is not dependent, in any way, upon an examination of the merits of appellant's contentions. Without an initial showing of standing we are unable to reach the merits of appellant's allegations regarding DER's procedure.

The pertinent point is that the harm alleged to occur as a result of the DER action would not significantly affect an interest of appellant more than it would affect the common interest of all citizens in procuring obediance to the law, and it is clear that a person claiming to be aggrieved must assert an interest more substantial than the abstract interest of all citizens in having others comply with the law. See *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464, Pa. 168, 346 A.2d 269 (1975).

In sum, it is apparent from the Commonwealth Court's opinion in *Strasburg* that we have no choice but to find that appellant lacks standing to assert the protection of the surrounding environment as a basis for its appeal of the solid waste permit. Such an interest, opined the Commonwealth Court, is without foundation in either the Solid Waste Management Act or Article I, Section 27 of the Pennsylvania Constitution. *Strasburg v. DER, et al, supra*, at 415 A.2d 1017.

Appellant does aver an injury to itself when it asserts that its right to due process of law is violated by the DER's procedure for giving notice of the pendency of the permit application and for giving notice of the issuance of the permit. However, appellant has no due process rights; the courts have long held that municipalities are not persons within the meaning of the Fourteenth Amendment of the United States Consitution. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *City of Newark v. New Jersey*, 262 U.S. 192 (1923); *Northwestern School District v. Pittenger*, 397 F. Supp. 975 (W.D. Pa. 1975).

Also, we cannot grant relief based on appellant's contention that the notice procedure violates the due process rights of its citizens as the Courts have continually held that a municipality is a creature of the sovereign created for the purpose of carrying out local government functions and thus does not have standing to raise due process claims on behalf of others. *Snelling v. Department*

of Transportation, 27 Pa. Commonwealth Ct. 276, 366 A.2d 1298 (1976). *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) and *DER v. Westmoreland-Fayette Sewage Authority*, 18 Pa. Commonwealth Ct. 555, 336 A.2d 704 (1975).

We also lack jurisdiction to respond to appellant's assertion that the DER failed to comply with the Pennsylvania Open Meeting Law, *supra*, as Section 9 thereof grants jurisdiction for its enforcement to Commonwealth Court. *Brady Township, et al v. Commonwealth of Pennsylvania, et al*, 1975 EHB 241.

Therefore, since appellant has failed to show how the DER's action affects its municipal functions directly or substantially we hereby dismiss its appeal

CONCLUSIONS OF LAW

1. The Borough of Jefferson lacks standing to assert the health, safety and welfare of its citizens as a basis for an appeal of a DER action granting a solid waste permit.

2. A municipality is not a person within the meaning of the due process clause of the Fourteenth Amendment of the United States Constitution and thus a municipality does not have due process rights.

3. The Borough of Jefferson lacks standing to assert the due process rights of its citizens.

4. The Environmental Hearing Board does not have jurisdiction to enforce the Pennsylvania Open Meeting Law, the Act of June 10, 1974, No. 175, 66 P.S. 261 *et seq.*

O R D E R

AND NOW, this 26th day of November , 1980, it is hereby ordered that the appeal of Jefferson Borough from Solid Waste Permit No. 300615 issued by the Department of Environmental Resources on May 3, 1979 to Fern Valley Industries is dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: November 26, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOBY CREEK WATERSHED ASSOCIATION, INC., et al :

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ESQUIRE FUEL COMPANY, Intervenor

Docket No. 80-061-H

Mine Drainage Permit
The Clean Streams Law
Surface Mining

ADJUDICATION

By Dennis J. Harnish, Member, December 8, 1980

The following adjudication is based upon an appeal from the issuance, by the Pennsylvania Department of Environmental Resources (DER), of a mine drainage permit No. 2479104 to Esquire Fuel Company (Esquire). The appellants are Toby Creek Watershed Association (TCWA) and Mary Stutz (Stutz). Esquire intervened in the matter and participated in the hearings held on June 2 and 3, 1980 before Hearing Examiner, Louis R. Salamon, Esquire in Dubois, Pennsylvania.

FINDINGS OF FACT

1. Esquire Fuel Company is engaged, *inter alia*, in the business of bituminous coal surface mining. It operates an office in Brockway, Pennsylvania and is duly licensed as a mine operator.

2. DER, through its Surface Mining Bureau, is the agency of this Commonwealth which is responsible for the administration of those sections of The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq*. which relate to the operation of coal mines, including the discharge of industrial wastes generated by the operation proposed by Esquire. DER, through its Surface Mining Bureau, is also responsible for administering those regulations, adopted by the Environmental Quality Board of Pennsylvania, which were adopted pursuant to The Clean Streams Law, *supra*, and which also relate to the operation of coal mines.

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

4. In May of 1979, the Surface Mining Bureau of DER received from Esquire an application 2479104 on forms provided by DER, for a permit approving the discharge of industrial wastes and mine drainage pursuant to The Clean Streams Law, *supra*, (mine drainage permit). A permit based upon said application was issued on March 7, 1980.

5. In said application it was disclosed that Esquire sought to remove coal by the methods of strip mining and auger mining from an area situate in Horton Township, Elk County, Pennsylvania. According to the contents of this application, the ground surface area to be affected by this mining would be 37 acres.

6. TCWA registered its opposition to the granting of the requested permit in a letter to DER. The concern manifested by TCWA was with regard to

the pollutional effects which siltation, generated as the result of this surface mining operation, would have on the receiving streams to-wit, an unnamed tributary to Little Toby Creek and Whetstone Run.

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

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

9. In its application for said Clean Streams Law mine drainage permit, Esquire provided a description of two settling basins (A and B) which it proposed to excavate in connection with its surface mining project.

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

11. The area of settling basin A expressed in square feet, is approximately 35,000 square feet.

12. The dimensions of settling basins A and B were calculated by Esquire's engineer through the use of interim guidelines of the Federal Office of Surface Mining (OSM).

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

14. In Section 102.13(d)(1) of Chapter 102, *supra*, 25 Pa. Code §102.13 (d)(1), Control Facilities - Sedimentation Basins, it is provided as follows:

"102.13. Control Facilities.

* * *

(d) Sedimentation Basins.

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

15. The OSM interim guidelines are more stringent than Chapter 102.13 (d)(1) of DER's regulations, i.e., the OSM regulations require a detention capacity of more than 7,000 cubic feet per affected acre. Thus, the settling basins in the presently appealed permit comply with both the said interim guidelines and Chapter 102.

16. Both the OSM interim guidelines and the Chapter 102 regulations are based upon detention time, as expressed in basin volume as the primary design criteria.

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

one day and in order to create a situation where the average of daily values for total suspended solids so discharge for 30 consecutive days shall not exceed 35 mg./l. The EPA publication stresses basin surface area rather than basin volume as the primary design criteria.

18. TCWA attempted to determine, by reference to this EPA publication, the total surface area for basins to be utilized in this surface mining project necessary to achieve that degree of settlement and storage of sediment which would be required in order for Esquire to discharge effluent to the waters of the Commonwealth the total suspended solids content of which was within the limits set forth in finding of fact No. 17.

19. In attempting to reach such an area figure TCWA utilized the data as to rainfall intensity in Elk County, Pennsylvania, supplied by Esquire in said permit. Toby Creek also utilized data as to the degree of slope and as to the nature and content of the soil in the particular area to be surface mined as supplied by Esquire, in its application, and by the U.S.D.A. Together with this data, TCWA utilized material contained in said publication as to velocity and amount of expected soil runoff. When this data and material was utilized in a calculation as set forth in said publication, known as the rational method, TCWA reached the conclusion that basin A should have a surface area of 203,959 square feet.

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

21. On May 3, 1976, EPA promulgated interim final regulations in which effluent guidelines and standards were established with regard to discharges from, *inter alia*, bituminous coal mines. These interim final regulations were published

in Vol. 41, Fed. Reg. No. 94, pp. 19832-19843. In Subpart C - Acid or Ferruginous Mine Drainage Category, §434.32(a), 40 CFR §434.32(a), the following effluent limitations were established after application of the best practicable control technology available:

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

For existing sources, these effluent limitations were to be achieved not later than July 1, 1977. On April 26, 1977, EPA amended §434.32(a), *supra*, to the extent that the effluent limitation with regard to dissolved iron was deleted. See Vol. 42, Fed. Reg., No. 80, p. 21385, 40 CFR §434.32(a). These regulations were reissued at 44 FR 76791 on December 28, 1979.

22. These EPA promulgated regulations, in which said effluent limitations were provided, were expressly made binding upon Esquire by DER when Esquire received its said mine drainage permit by virtue of special condition 49.

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

"CHAPTER 95. WASTE WATER TREATMENT REQUIREMENTS

§95.1 General Requirements

(a) Specific treatment requirements and effluent limitations for each waste discharge shall be established based on the more stringent of subsection

(b) of this section, the water quality criteria specified in Chapter 93, of this Title (relating to water quality criteria), the applicable treatment requirements and effluent limitations to which a discharge is subject under the Federal Water Pollution Control Act, as amended (33 U.S.C. §§1251 *et seq.*) or the treatment requirements and effluent limitations of this Title. The 1979 amendments to §95.1(a) merely strengthen the requirement for compliance with federal law in state permits."

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

25. The present permit would permit a continuation of mining of the Middle Kittanning seam of coal which Esquire mined on the contiguous Farnsworth property under Mine Drainage Permit 4677SM14.

26. The only acid discharge from the Farnsworth mine (which flows from bore holes thereon) pre-existed Esquire's mining operations.

27. The presently appealed permit does not allow Esquire to use blasting as a mining technique.

28. The Brockway Borough water supply reservoir is located upstream from the proposed mining site and would not be affected by Esquire's mining operations.

29. The Brockway Borough water supply well is located upgradient from the proposed mining site and neither this well nor any proposed water supply well would be affected by Esquire's mining operations absent blasting.

30. Esquire's diligence in complying with state and federal mining laws has been at least at the industry average.

31. Water percolating through the reclaimed area after reclamation on the proposed site will not degrade groundwater in the area below its present condition.

DISCUSSION

For some time Esquire has operated a surface mine known as the Farnsworth mine under mine drainage permit 4677SM14 in Horton Township, Elk County. Esquire now desires to follow the Middle Kittanning Coal seam it has been mining on the Farnsworth property to the contiguous Esposito property.

To effectuate this intent Esquire applied to DER and, on March 7, 1980, DER issued to Esquire, Mine Drainage Permit 279104 covering some 37 acres including some 10 acres of mineable coal.

The appellants, a nearby landowner and Toby Creek Watershed Association, an association dedicated to preserving and protecting the water quality of Little Toby Creek and its tributaries, have appealed the issuance of said permit.

The proposed mining site is situated between Whetstone Run on the south which is a tributary of Little Toby Creek and an unnamed tributary of Little Toby Creek on the north. Since the proposed mining site lies astride a water divide, the runoff from this site is divided between flows directed towards Whetstone Run and towards the unnamed tributary. The permit in question provides for two sediment ponds, designated as Ponds A and B to intercept runoff towards, respectively, Whetstone Run and the unnamed tributary. Separate facilities are provided for treatment of drainage from the operating mine and the sediment basins provide no treatment for acid or metals.

A. Size of Sedimentation Basins.

The appellants argue that the sedimentation basins are undersized to properly remove sedimentation and also fail to treat acid and heavy metals in the

runoff from the spoil pile. Appellants base their argument concerning the size of the basin on the testimony of Timothy E. Keister. Mr. Keister, a member of Toby Creek Watershed Association, was qualified to testify concerning basin sizing and design on the basis of his experience as an environmental engineer with Brockway Glass Company and his design of treatment basins for Becker Coal Company (which basins were never installed).

In his calculations Mr. Keister utilized the so-called rational method as expressed by the formulas:

$R = Kx$ (Precipitation factor) x (Surface area drained);

$Q = R/T$;

$Vs = g/18u\ (S-1)D^2$; and

$A = Q/Vs \times 1.2$; where R = runoff;

T = excessive storm concept time; Vs = settling velocity based upon Stoke's law and

A = calculated surface of the settling basin.

K = a constant

On the basis of the above formula, Mr. Keister calculated that basin A should have a surface area of 209,820 square feet. Since the surface area of this basin as per the permit is approximately 35,000 square feet, Mr. Keister suggested that the present basin is woefully undersized and therefore could not meet the effluent criteria set forth in EPA's effluent guidelines.

Although, as discussed in greater detail below, DER and Esquire questioned the assumptions Mr. Keister used in applying the rational method, their main attack was upon this method. Dr. William Hellier, a highly qualified DER engineer, testified that both sedimentation ponds had not been designed on the basis of the rational method, but rather, on the basis of OSM interim guidelines which represent a different but equally efficient method of attaining appropriate sediment

settling. Moreover, Dr. Hellier and Duane Berry, the registered professional engineer who designed the basins testified, and Mr. Keister admitted, that sedimentation basin A more than met the requirement of Chapter 102.13(d)(1) of DER's regulations of a settling basin capacity of 7,000 cubic feet/acre of disturbed earth.

It is indeed ironic that, in this case, TCWA urges this board to reject, as deficient, the requirements of Chapter 102 as well as to reject OSM's detention time, i.e., volume oriented, approach to sizing sedimentation basins, because in *Toby Creek Watershed Association, Inc. v. DER and Doan Coal Company*, 1978 EHB 23, TCWA urged this board to require DER to apply Chapter 102 and a volume based formula to size sedimentation basins. Moreover, although Esquire's and DER's experts agreed that the rational method was a known and approved method for sizing sedimentation basins, this method *per se* has the weight only of suggestion rather than regulation and thus does not bind DER. *Commonwealth of Pennsylvania v. Harmar Coal Company*, 452 Pa. 77, 306 A.2d 308 (1973).

In spite of the above, however, this board is not prepared to entirely discount Mr. Keister's testimony. In the first place, EPA's summary of sedimentation basin technology, (which was cited by Esquire in its brief as 42 Fed. Reg. 80, pp. 21,380-21,390) seems to add support to Mr. Keister's assertion that the surface area of a sedimentation pond is the primary design factor for the pond. Secondly, on page 397 of the notes of testimony, Dr. Hellier testified that he did not know whether the sedimentation pond A, as presently designed, would meet the 70 milligrams/liter maximum suspended solids standard.

Thirdly, although some of the assumptions used by Mr. Keister, e.g., the viscosity number, were ably called into question by DER's cross-examination,

Mr. Keister's testimony *in toto* does seem to hold up, assuming that surface area rather than detention time is the better method for sizing sediment basins.[1]

Although Mr. Keister's testimony is not discounted it does not satisfy the appellants' considerable burden of proving that DER's methodology of basin sizing is arbitrary and capricious; it merely raises a concern about the design of the basins. Moreover, the board's concern is ameliorated by the special conditions added to Esquire's permit by DER (as listed in intervenor's Exhibit 3).[2]

---

1. a. Using a substantially higher temperature than the 32°F used by EPA in the Viscosity formula results in reducing the calculated basin area to about 100,000 square feet. But this area is still approximately 3 times the size of Basin A and there was no testimony on what an appropriate higher temperature would be in practice.

b. The other questioned factor or assumption used by Mr. Keister was the time we used in calculating the flow rate. Dr. Hellier used 24 hours as the time apparently on the assumption that the basin was designed for 24-hour retention. However, the basin in accordance to the permit and Duane Berry's testimony was only designed for 10 hours detention and the EPA formula seems to be designed not to account for steady flow but for the peak flow within a 24-hour period. Thus, Mr. Keister's use of the EPA methodology to determine the time for use in calculating flow to the basins does not seem to be palpably erroneous.

2. "In order to complete the processing of this permit the following must be included in the sedimentation and erosion control plan:

1. All erosion and sedimentation control facilities shall be installed under the direction of a registered professional engineer prior to any other mining activities. The engineer shall submit certification that ponds were constructed in accordance with approved plans.

2. Grades of all ditches shall be surveyed and staked in field to insure that grades are uniform and not exceeding 3% as specified in application.

3. A filter fence constructed of filter fabric shall be installed in the sedimentation ponds. The fence shall extend across the full width of the ponds and shall be located 10' to 15' before the riser or principal spillway. The filter fence shall be installed in such a manner that would maintain the top edge of the fence at or above the surface water elevation at all times across the entire width of the ponds. The bottom of the pond fence shall be anchored to the bottom of the pond or the bottom shall be sufficiently weighted to keep the bottom of the filter fence

Certainly, these conditions could only improve the effectiveness of the sedimentation basins. Any lingering doubts are met by special condition 49 of the permit which requires that:

---

2. continued

near the bottom of the pond across the entire width of the pond. The filter fence must be inspected periodically after precipitation events and shall be replaced if the fabric begins to show signs of serious degradation. The choice of fabric type shall be left up to the operator.

4. Filter fabric silt fences acting as check dams shall be installed in all interceptor ditches. Spacing of silt fences shall be every 150' except where the slope of the ditch exceeds 5% in which case the spacing will be decreased to 100'. The filter fabric shall be of the woven type and shall have 25% or more open area or be equivalent to the US #40 sieve (40 E.O.S.) or larger. The silt fence shall be installed in a secure manner, shall be installed so that the maximum depth of water build-up behind the fence is limited to 1.5', and shall have the bottom 1.0' to 2.0' of fence buried.

5. Filter fabric silt fences shall be installed on the downslope side of all sedimentation ponds. These silt fences must be installed prior to disturbing any earth and shall be left in place until such a time as there is a good vegetative cover on the side slopes and top of the pond. The filter fabric shall be of the woven type and shall have 25% or more open area or be equivalent to the US #40 sieve or larger. The silt fences shall be installed in a secure manner and shall have the lower 1.0 to 2.0' of fence buried. The silt fences must be checked on a regular basis for damages or excessive sediment buildup and shall be maintained in good working order.

6. No soil shall be placed on the downslope of any ditch. In addition, all ditches and ponds shall be seeded upon completion. The seeding mixture shall consist of both temporary and permanent vegetative types.

7. Dumped rock energy dissipators or level spreaders shall be constructed at the outfall of all sedimentation and treatment ponds to prevent erosion beyond the outlets. If rock energy dissipators are utilized a properly engineered aggregate filter or filter fabric shall be placed on the soil prior to placement of the rock."

"49. Discharges of water from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations, and at a minimum, the following numerical effluent limitations:

EFFLUENT LIMITATIONS, IN MILLIGRAMS PER LITER, mg/l, EXCEPT FOR pH

Effluent Characteristics	Maximum Allowable	Average of Daily Values for 30 Consecutive Discharge Days
Iron, total	6.0	3.0
Manganese, total	4.0	2.0
Total suspended solids	70.0	35.0
pH	within the range 6.0 to 9.0	

These effluent limits take precedence over any standards mentioned in the Standard or Special Conditions or this Mine Drainage Permit."

Since special condition 49 specifically incorporates EPA's effluent guidelines for bituminous coal mines, as set forth at 40 CFR 434.32(a), which standards are applicable to the instant permit by virtue of 25 Pa. Code §95.1(a), the permit acts as a guarantee that all applicable federal and state standards will be met. This simply means that if sedimentation basin A is improperly designed it will have to be redesigned.

B. Acid and Metals in Spoil Pile Runoff.

Another issue raised by the appellants, acid and heavy metals in the runoff from the spoil pile (which would flow to sedimentation basin B) is also answered by special condition 49. Appellants' leachate analysis of the overburden from the adjacent Farnsworth mine did indicate the presence of iron, manganese

and a low pH and this evidence would seem to have relevance since Esquire's consultant agreed that the same strata which overlies the Farnsworth mine also overlies Esposito's property, i.e., the site covered by the permit in question in this matter. Further, the testimony reveals that no treatment specifically for acid or heavy metals will be provided in either sedimentation basin. However, again, the iron, manganese and pH of the effluent from sedimentation basin B must be in accord with special condition 49 so that any additional treatment which may be necessary to attain this result must be implemented by Esquire.

C. Affect on Water Supplies.

Appellants also noted their concern that mining on the proposed site would adversely affect the Brockway Borough Authority well and/or its reservoir both of which are utilized as public water supplies in Brockway Borough. The problem with this argument is that both the well and the reservoir are located upstream from the proposed mining site.

Obviously, even if the site produced an acidic effluent full of heavy metals this would not affect the upstream reservoir. In addition, appellants' witnesses admit that, absent blasting, the proposed mining could not affect the upgradient well either (or other proposed wells). The permit in question does not call for blasting and Esquire has stipulated that appellants will not be precluded from challenging any future blasting permission granted to Esquire by DER by taking a timely appeal to that action if and when such permission is granted. Thus, any further consideration of blasting is not appropriate at this time.

D. Coal Seam Designated in Permit.

Appellants' next challenge to the permit is based upon allegedly erroneous revision of the permit to indicate that the coal seam to be mined under the permit is the Middle Kittanning seam. Appellants argue that Esquire's original application designated the coal seam to be mined as the Lower Kittanning was correct. Appellants further point out that Esquire's very highly qualified consultant, Edward Lancaster, had, when he was a DER inspector, noted that the Lower Kittanning seam had a very high acid bearing potential while the Middle Kittanning seam had substantially less acid bearing potential so that in his opinion, mining should be allowed on the latter, but not the former, seam. Esquire, however, counters by asserting that coal seam analysis clearly shows that the coal seam underlaying the Esposito property is the Middle not the Lower Kittanning. Esquire also asserts that although there is a variance of up to 15 feet in the borehole elevations of the coal seam under Esposito's property *vis-á-vis* U.S.G.S. topo maps, no variance less than 35 feet would be enough to indicate that the seam was the Lower Kittanning.

Since appellants have the burden of proof in this case and since they introduced no evidence on this issue, it is clear that on this issue Esquire and DER must prevail.

E. Affect on Groundwater.

Appellants' next attack on the permit is based upon the testimony of DER's mine inspector Dean Scott Jones. Mr. Jones testified that the mining site is in the recharge area for Little Toby Creek so that groundwater flowing under the mining site would eventually reach Toby Creek. Mr. Jones also testified, on the basis of his experience, that groundwater flowing through the reclaimed area

would have a pH of approximately 5 to 5.5. Obviously, this is below DER's effluent requirement of 6 pH. However, this effluent limit does not apply to groundwater *per se* and, moreover, Mr. Jones also testified that he didn't believe that there would be any significant decrease in groundwater quality because of the mining since wells intersecting the Middle Kittanning seam already produce water with 5 to 5.5 pH. Some of the premining samples in intervenor's Exhibit 1, the mine drainage permit support Mr. Jones' testimony. Appellants' have introduced no contrary testimony so again the issue must be resolved in favor of DER and the intervenor.

F. Violations on other Esquire Sites.

Appellants next argue that Esquire should not be granted the present permit because Esquire's violations on properties it has mined shows it to be unable or unwilling to comply with permits. The only evidence introduced to demonstrate violations on other Esquire sites did clearly show that the discharge from boreholes on the Farnsworth mine site was in violation of DER standards. On the other hand, the evidence also clearly demonstrated that this discharge began before Esquire initiated its mining operations on the Farnsworth property. (See especially the testimony of Mr. Lancaster at page 473 of the notes of testimony.) Therefore, there is no evidence in the record of any violations caused by Esquire at any other mining sites. To the contrary, the record is replete with testimony from present and past DER inspectors that Esquire has demonstrated at least average, if not superior, ability to comply with the law.

G. DER Enforcement Capabilities.

The appellants' final argument[3] is that DER does not have the requisite enforcement capabilities to enforce the presently appealed permit. DER, through the enforcement chief of its Mining Bureau, Mr. Charles Gumno, agreed that the Mining Bureau was underfinanced and its mining inspectors, consequently, overworked. On the other hand, Mr. Gumno also testified that it was DER's policy to promptly investigate every complaint. Moreover, the federal Office of Surface Mining responded at least twice to the complaints of the appellant, TCWA regarding the Farnsworth mine and DER also promptly investigated TCWA complaints.

It is clear, therefore, that the appellants will be able to obtain a prompt investigation of any violation of the proposed permit by simply reporting same to DER and OSM. In fact, as described in the Order below, the board is going to involve the appellant TCWA in the monitoring of the presently appealed permit.

In conclusion, none of appellants' arguments has persuaded this board to delay or deny Esquire's permit. The appellants' evidence, at most, has raised some concern that the sedimentation ponds A and B may not be able to produce an effluent in conformance with the requirements of Special Condition 49 of the permit.

In order to alleviate these concerns DER, TCWA and Esquire are directed to jointly develop a monitoring program for the effluent from said basins. This program, plus the other special conditions added to the said permit, should protect the waters of the Commonwealth and, consequently, the appellants' appeal is dismissed and Esquire's permit amended as per the Order below.

---

3. In her brief, appellant Stutz attempts to raise an issue concerning Esquire's allegedly erroneous mining maps. Since there was not one word of testimony on this issue during the hearing, this issue cannot and will not be considered by this board.

CONCLUSIONS OF LAW

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

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

3. In issuing this mine drainage permit to Esquire, DER considered the directives contained in Section 102.13(d)(1) of Chapter 102, *supra*, 25 Pa. Code, §102.13(d)(1), which relate to the manner in which the volume of sedimentation basins is determined and these directives were met.

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

5. In issuing this mine drainage permit DER applied the federal effluent guidelines to Esquire in special condition 49.

6. DER and Esquire have attempted to meet the said federal effluent guidelines by designing the settlement basins in accordance with OSM interim guidelines and additional special conditions as well as using Chapter 102. Thus, DER has not been arbitrary or capricious in approving Esquire's basin design, but the federal effluent guidelines, nevertheless, constitute performance standards which must be met.

O R D E R

AND NOW, this 8th day of December, 1980, the appellants' appeals from the issuance by DER of Mine Drainage Permit 2479104 are dismissed.

It is further ordered that Esquire, DER and TCWA shall jointly develop and implement a monitoring program to ensure that the effluent from sedimentation basins A and B as described in the above permit, complies with all applicable state and federal standards. This plan shall be developed within forty-five (45) days. This board shall retain jurisdiction in this matter to resolve any disputes which may arise concerning the said monitoring program.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis J. Harnish

BY: DENNIS J. HARNISH
Member

DATED: December 8, 1980

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. 79-022-CP-W

:

Clean Streams Law
Civil Penalty

v. :

SOUTH MIDDLETON TOWNSHIP BOARD OF
SUPERVISORS and LARRY METCALF, et al.

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

By: Paul E. Waters, Chairman, December 10, 1980

This matter comes before the board on complaint for Civil Penalties filed by DER against the Supervisors and Secretary of South Middleton Township in Cumberland County, Pa. Township applied for and was issued a permit under the Water Obstruction Act, Act of June 25, 1913, P.L. 555, *as amended,* 32 P.S. §381, *et seq.* which authorized certain stream clearing activity, to help alleviate a flooding problem. The application had specifically indicated that no heavy equipment would be placed in the stream. On October 19, 1978, the Township Secretary was present when a bulldozer began operations in the streambed, and removed part of an island in the Yellow Breeches Creek. The activity came to the attention of DER and was halted on October 20, 1978. This action seeks penalties for damage to the stream and its fish population. While DER seeks to attach personal liability to the defendants, they argue that they are immune from suit.

FINDINGS OF FACT

1. Plaintiff, the Commonwealth of Pennsylvania, Department of Environmental Resources (hereinafter DER), brings this action pursuant to §605 of The Clean Streams Law.

2. Defendant, the Board of Supervisors of South Middleton Township, Cumberland County, Pennsylvania, has its office at Woodcraft Drive, Mt. Holly Springs, Pennsylvania, 17065, and is comprised of the following officials:

(1) Larry Metcalf, Chairman of the Board, 521 Forge Road, Carlisle, Pennsylvania, 17013.

(2) Ray Otto, Vice Chairman of the Board, R.D. 6, Carlisle, Pennsylvania, 17013.

(3) Gerald Clepper, Member of the Board, Front Street, Boiling Springs, Pennsylvania, 17007.

(4) Ann Neimer, Secretary-Treasurer of the Board, Box 58, Mt. Holly Springs, Pennsylvania, 17065.

3. As a result of the citizens' complaints and at the direction of the supervisors, Mrs. Neimer contacted DER through a letter to Mr. Mike Stover under date of May 30, 1978, requesting that he inspect the area and report on the debris that had collected. A letter was subsequently received from DER, signed by Mr. John P. Barnhard, Chief of the Division of Stream Improvements, indicating that funding was not available from DER for this type of project.

4. A letter was then sent to Mr. Nelson Punt, Cumberland County Commissioner and Chairman of SETCO, on June 21, 1978, requesting funds that Mr. Punt had indicated were available from the CETA Program. Mr. Punt's reply of June 27, 1978, indicated that the CETA Program had ended and suggested that the Board of Supervisors apply to SETCO for funding. The CETA Coordinator

supplied Mrs. Neimer with a copy of a narrative that had been approved to aid in her preparation of the necessary papers. The application to SETCO was completed by fashioning it after the model narrative.

5. Over a two-day period, October 19 and 20, 1978, approximately five and one-half hours was expended by Mr. Kenneth Pannebaker, bulldozer operator for the John Walter Company, at the project site.

6. On July 21, 1978, the South Middleton Township Board of Supervisors applied to the Department for a permit under the act of June 25, 1913, P.L. 555, *as amended.*

7. The application was for the consent or permit of the Department to "remove debris and heavy underbrush within and along the banks, in, along or across Yellow Breeches Creek." The application also stated that "heavy equipment will be used but will not be permitted to enter the streambed at any time unless prior approval is given."

8. On September 20, 1978, the Department approved the application of South Middleton Township Board of Supervisors and issued a permit.

9. On October 19, 1978, the John Walter Company informed Mrs. Neimer that the equipment was arriving at the stream site, she proceeded to the project location. Other persons at the site included Mr. Sylvester Mixwell, foreman for the John Walter Company, and Mr. Richard Stone, who was unofficially overseeing the project since he lived adajacent to the project site and had knowledge of heavy equipment operations. At no time in the course of conversation did Mrs. Neimer instruct the bulldozer operator to place the equipment in the stream.

10. On the afternoon of October 19, 1978, Mrs. Neimer sent a letter to Mr. James Flesher, Operations Chief of DER, advising him of the project's commencement as was required by Special Condition "B" of the DER Permit.

11. Work was done on the stream for a distance of approximately 150 yards — 50 yards downstream from the Route 34 bridge and 100 yards upstream. Debris was removed downstream from the bridge placed on the south bank by the bulldozer located in the stream. Upstream from the bridge, Mr. Pannebaker be-

gan to remove an island that had formed in the middle of the stream along with the other debris that had collected.

12. In response to a phone call from Mr. William Harms in the evening hours of October 19, 1978, Mr. Perry Heath, District Law Enforcement Officer for the Pennsylvania Fish Commission, went to the project site and ordered Pannebaker to cease and desist his operations. The operation ceased immediately upon Heath's request. Approximately 50 yards of the island had been removed at that time.

13. On October 23, 1978, Mr. Ronald Hughey, a water pollution biologist for DER, visited the site of the activity. Mr. Hughey again returned to the site on November 21, 1978, for the purpose of collecting biological samples which samples indicated a reduction in the community of the aquatic macroinvertebrates.

14. In a letter sent to the Board of Supervisors by Mr. Ronald Hughey, dated November 6, 1978, follow-up directions were given concerning activities to be done by the Township at the project site. These curative instructions were promptly completed by the Township.

15. Samples were taken once again by Mr. Ronald Hughey on September 4, 1979, approximately ten months after the first sampling. As a result of this sampling, a report was prepared. The report showed a reduction of macroinvertebrate of approximately 76 in the undisturbed area whereas in the distrubed area, there was an increase in these organisms of 165 in number, which is evidence of a 30-40 percent recovery rate. Continuing recovery at a like rate would allow for total recovery of the alleged "disturbed" area in approximately twenty months.

16. In issuing the permit the Department was "giving its consent to: remove debris and heavy underbrush from within and along the channel of Yellow Breeches Creek through a reach of approximately 850 lineal feet above Pa. Rt. 34 in South Middleton Township, Cumberland County."

17. The permit also incorporated the Department's understanding "that the work shall be performed in accordance with the maps, plans, profiles and specifications filed with [sic] part of the application."

18. In October 1978 defendants rented a bulldozer to be used in connection with the work under the permit and on October 19 and 20, 1978, defendants' rented bulldozer entered the channel of Yellow Breeches Creek and conducted earthmoving activities in the channel.

19. The earthmoving activities performed by the bulldozer included the removal of part of an island in the Yellow Breeches Creek, excavation of gravel from the bed of Yellow Breeches Creek and earthmoving activity along the banks of the Yellow Breeches Creek.

20. Earth that was removed from the island and the streambed was placed on top of the stream banks and along the sides of the streambank.

21. The Yellow Breeches Creek is a trout stream known throughout the state as an outstanding fishery.

22. No erosion and sedimentation control plan was either prepared or implemented for the earthmoving activity by the bulldozer.

23. Ten months after the earthmoving activity caused by defendants, the aquatic community in the affected segment of Yellow Breeches Creek had experienced a thirty to forty percent recovery. It is unknown whether recovery will continue at the same rate in the future.

D I S C U S S I O N

South Middleton Township had been experiencing problems upstream from an island in Yellow Breeches Creek and concluded that if the channel were cleaned and debris buildup removed, some flooding could be alleviated. In an effort to accomplish this, the Township applied to DER for a permit, which is required under the Pa. Water Obstruction Act, Act of June 25, 1913, P. L. 555, *as amended*, 32 P.S. §381, *et seq.*

The application which was filed with DER had been prepared by the Township engineer[1] and typed by the Township Secretary, who was named as a party defendant. The Township also applied for funding from SETCO, and after the DER permit was granted funding for the project was also approved. There is no dispute that the application to DER indicated in reference to the Yellow Breeches project that — "heavy equipment will be used but will not be permitted to enter the streambed at any time unless prior approval is given". It is equally clear that on October 19, 1978, a bulldozer operated pursuant to an agreement with the Township, and while being observed by the Township Secretary, entered the creek removed part of an island and excavated gravel from the bed of the creek. This operation continued on October 20, 1978 until a Waterways Patrolman ordered the operation stopped because of damage being done to the fish living in the Yellow Breeches Creek.[2] A later biological investigation indicated that, as expected, there was some long term-damage to the quality and quantity of fish and other life in the stream. Sampling within a lineal reach of stream extending some one hundred yards downstream from the excavation site was done three days after the incident and again ten

---

1. The Township engineer was not named as a defendant in this action.

2. This particular Creek is well known in Pennsylvania and beyond as an outstanding fishing area.

months after that.[3] Based on this evidence DER now seeks a "heavy" civil penalty, while giving no indication how it construes the term. We agree that the Township is clearly liable for a civil penalty. Whether the Supervisors and the Secretary are to be held liable personally, is another matter. The Clean Stream Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* provides, Section 605:

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

DER has also argued that 25 Pa. Code §102.4[4] which prohibits earthmoving activities without an erosion and sedimentation plan is an additional

---

3. The DER biologist was asked to quantify the damage to the stream during this period. He stated:

> "THE EXAMINER: Well, can you quantify it?
>
> THE WITNESS: In a percentage?
>
> THE EXAMINER: Yes, if you can; that you would be comfortable with.
>
> THE WITNESS: Thirty to forty percent recovery.
>
> BY MR. BLACK:
>
> Q In ten months?
>
> A I would still like to reiterate that that rate will not necessarily follow."

4. The Regulation provides *inter alia* "—any landowner, person or municipality engaged in earthmoving activities shall develop, implement and maintain erosion and sedimentation control measures which effectively minimize accelerated erosion and sedimentation. These erosion and sedimentation measures must be set forth in a plan as described in §102.5 of this Title (relating to erosion and sedimentation control plan) and must be available at all times at the site of the activity."

reason for imposition of civil penalties. We believe under the facts of this
5
case that if there was a violation, it has merged with the Clean Streams violation because it is the unauthorized earthmoving activity in the stream by the use of heavy equipment which forms the basis of each alleged violation.

Turning to the question of personal liability, we have no difficulty in deciding that the Supervisors, and the Secretary who performed only ministerial acts for them, are exempt from personal liability. In *Wicks v. Milzoco Builders., Inc.* --Pa. Commonwealth---360 A.2d 250 the Court said:

> "We simply believe that the Supreme Court's abolition of governmental immunity in *Ayala* did not and was not intended to effect an abolition of the doctrine of absolute immunity of high public officials.
>
> As to Monroe Township, we must disagree with the lower court's grant of its demurrer. We appreciate the lower court's difficulty in applying the doctrine of respondeat superior where the agents, whose alleged misconduct is to be imputed to the principal, are themselves immune from suit. However, we may not permit the clear holding of *Ayala* to be circumvented because the strict application of traditional agency concepts would require sustaining of the demurrer by the Township."

There can be no doubt that the Township Supervisors are immune from suit based on the decision in the *Wicks* case. It can, of course be argued that, even though the Supervisors are immune, that nevertheless the Secretary should be held personally liable. We can not believe that this was the intent of the *Wicks* decision and we decline to impose such liability based on the facts here.

As previously indicated, this immunity does not extend to the Township. There was no testimony present as to the assets of the Township, and very little evidence on the present and future damage to the creek. We believe the co-operation shown by defendants deserves consideration. We do not believe, as suggested by DER, that defendants planned to violate the law. We therefore will impose a penalty of $1,000 per day for each of the two days of violation, having taken all of the circumstances into consideration.

---

5. There is some question whether under a proper permit under Water Obstruction Act, for operations in the stream, there is a violation if it had authoriz the very activity engaged in, and less than 25 acres was affected.

CONCLUSIONS OF LAW

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

2. The individual defendants, Supervisors of South Middleton Township, and the Board Secretary are not personally liable for any Civil Penalty assessed pursuant to the Clean Stream Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq.* because of immunity extended to public officials.

3. South Middleton Township is liable for Civil Penalties because of the actions of its officers, in allowing heavy equipment to enter the Yellow Breeches Creek in violation of a permit issued under the Water Obstruction Act, Act of June 25, 1913, P.L. 555, *as amended*, 32 P.S. §381, *et seq.*

4. A Civil Penalty in the amount of one thousand dollars ($1,000) for each of the two days of violation is reasonable and will be imposed because, although we do not deem the action to have been willful it nevertheless did cause discernable damage to aquatic life in the creek.

O R D E R

AND NOW, this 10th day of December, 1980, in accordance with Section 691.1 of The Clean Streams Law, 35 P.S. §691.1, civil penalties are assessed against defendant, South Middleton Township, in the amount of Two Thousand Dollars ($2,000).

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

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DATED: December 10, 1980

CONCURRING OPINION

I concur in the penalty assessed by Chairman Waters and in his exclusion of the Township Supervisors and Secretary from individual liability.

I disagree, however, with the legal reasoning used by the Chairman to reach this result. I do not believe that *Wicks, supra* insulates municipal officials from civil penalties under Section 605 of the Clean Streams Law. In *Wicks* the Plaintiff was a private party who filed a complaint sounding in tort against *inter alia* the supervisors of Monroe Township, as individuals, as well as the Township.

Wicks, supra therefore, simply does not speak to the issue of whether the Commonwealth of Pennsylvania rather than a private party, may institute even a tort action against Township officials and no case standing for such a proposition has been cited. Moreover, the immunity discussed in *Wicks, supra* is restricted to immunity against civil actions sounding in tort. The Pennsylvania Supreme Court in, *Jonnet v. Bodick*, 244 A.2d 751, which opinion was cited in *Wicks, supra* , discussed the range of immunity of Township supervisors and while that Court held that the range of immunity was broader than suits for defamation, it did restrict immunity to tort suits.

A civil penalties action is not a tort suit. True, this board has used tort analogies in ascertaining degrees of willfulness *Rushton Mining Co. v. DER*, 76 EHB 117; *Commonwealth of Pa., DER v. Froehlke* 2 EHB Reports, Vol. 2, p. 118. However, in both of those cases the board was careful to note that tort law was used only by way of analogy and in both cases criminal law was also used by way of analogy, yet the board expressly held that civil penalties were not criminal penalties.

Further evidence that civil penalties complaints not barred by tort immunity provisions is contained in *DER v. Middleton Township Municipal*

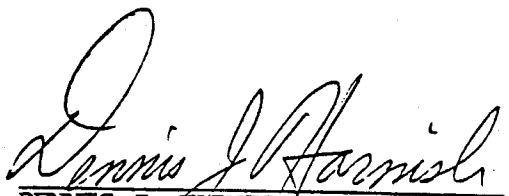
Authority, Vol. 1 EHB Reports p. 8 where a civil penalty was assessed by this board against a Pennsylvania Municipality on May 2, 1972. Since *Middleton, supra* predated *Ayala, supra* , wherein the Pennsylvania Supreme Court abolished governmental tort immunity, *Middleton, supra* , at least implicitedly, understates the difference between civil penalties and tort actions.

Although I have disagreed, as discussed above, with the Chairman's legal reasoning, I agree with the amount of penalties he assessed since it seems to be in line with assessments in similar cases. First of all, it is in line with *DER v. Mount Royal Associates*, EHB Reporter, Vol. 3, p. 18 since the damage in question is real but not overwhelming (100 yards affected with a good chance for complete recovery) and the assessment is in the $500-$10,000 range. Moreover, the assessment is in line with civil penalty assessments in *DER v. Federal Oil & Gas Co.*, 75 EHB 186 and *DER v. Trindle Construction, Inc.*, 75 EHB 337 which cases involved greater amounts of environmental damage than the instant matter.

Apparently, the Commonwealth would differentiate this case from those cited above on the basis of willfulness. Indeed, the alleged willfulness of the municipal officials would seem to be the only reason to assess individual penalties against them. On the issue of willfulness, the impression of trier of fact must be given great weight; of those who decide civil penalties cases, only the hearing examiner can observe the demeanor of the witness. Thus, I am not prepared to differ with Chairman Waters' opinion that neither the Township's Secretary nor any of its Supervisors acted willfully in this matter. Consequently, I believe

that these individuals should not be individually assessed for the reasons expressed in *Rushton Mining, supra* wherein the board refrained from assessing individual penalties against Warren H. Hinks, Jr., President of Rushton Mining.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

DATED: December 10, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

JOHNSON S. BAUM : Docket No. 79-163-B

: Water Obstructions Act

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ADJUDICATION

By the board, December 23, 1980

This case arises from an appeal by Johnson S. Baum from a denial by the Department of Environmental Resources (DER) of his application for a permit to install a fifteen-inch pipe culvert in a tributary of Campbell Run in Cook Township, Westmoreland County. The permit is required by the Water Obstructions Act, the Act of June 25, 1913, P.L. 555, *as amended*, 32 P.S. 681 *et seq.* DER's denial was based on its finding that a fifteen-inch pipe is not large enough to carry the tributary during periods of heavier than normal flow.

A hearing was held in Pittsburgh, Pennsylvania on appellant's appeal and the DER has filed a post-hearing brief.[1]

---

1. Appellant declined the opportunity to file a post-hearing brief.

FINDINGS OF FACT

1. Appellant is Johnson S. Baum, an individual whose mailing address is R. D. 4, Box 153B, Latrobe, Pennsylvania.

2. Appellee is the Department of Environmental Resources, the agency entrusted with the duty to administer and enforce the provisions of the Water Obstructions Act, the Act of June 25, 1913, P.L. 555, *as amended*, 32 P.S. 681 *et seq.*

3. Appellant owns a 110-acre parcel of land in an area known as Bethel Church in Cook Township, Westmoreland County.

4. The 110-acre parcel is divided by Township Road No. 583 into two tracts, one of 80 acres and the other of 30 acres. The 30 acre tract, which is located to the north of T.R. 583 has been laid out in tracts of about six acres and one of the six-acre tracts has been subdivided into eight lots.

5. Appellant constructed a dirt road for access to the eight lot subdivision.

6. At a point about 1400 feet from Township Road 583 the access road crosses a stream.

7. To enable the access road to cross the stream, appellant enclosed the stream with a sixty-foot long culvert and covered the culvert with dirt fill.

8. The culvert is constructed of fifteen-inch plastic pipe for the first twenty-five feet from the upstream end and eighteen-inch pipe for the remainder of its sixty foot length.

9. The fill over the pipe ranges in depth from seven feet on the upstream end to 12 feet on the downstream end. The fill is 50-feet long and 15-feet wide.

10. The culvert was constructed by appellant in the fall of 1978.

11. Appellant initially intended to install 12-inch diameter pipe until he found he could purchase fifteen-inch pipe from a neighbor who had it left over from a project he had undertaken.

12. Appellant did not calculate either the volume of water flowing to the culvert or the carrying capacity of the culvert.

13. Appellant prepared his tract of land for individual lots in accord with the rules of, and in consultation with, the Westmoreland County Planning Commission. A representative of the Westmoreland County Planning Commission told appellant that he should inform the DER about the culvert he installed under the road.

14. On December 8, 1978 appellant filed an application with the DER for a Water Obstructions permit for the culvert.

15. Appellant received help with the preparation of the application from Donald Faust a registered surveyor.

16. The culvert does not have sufficient capacity to carry the volume of water generated by a 2-year storm.

17. When the culvert reaches its capacity the fill will act as a dam and impound the water to a depth of seven feet.

18. When the water reaches a depth of seven feet it will begin to flow over the access road.

19. The access road provides the sole access to the eight lot subdivision.

20. The earthen fill over the culvert was not constructed with the intent that it be used as a dam.

21. Appellant has not shown that the earthen fill is capable of functioning as a dam.

22. When the water reaches a depth of seven feet behind the fill it will form a pool 100-feet long. The pool will extend onto an adjacent property.

DISCUSSION

The Pennsylvania Water Obstructions Act, *supra*, requires a person to procure a permit from the DER prior to installing a stream obstruction or enclosure. Here, DER denied appellant's application for a permit for a sixty-foot long culvert to convey a stream under a road he has constructed. Unfortunately appellant installed the culvert prior to submitting the application to DER.

Appellant owns a 110-acre parcel of land in an area of Cook Township, Westmoreland County known as Bethel Church. Included in the parcel is a six-acre tract which has been recently subdivided into eight lots. For access to the eight lots, appellant constructed a dirt road to the subdivision from Township Road No. 583. The access road had to cross an unnamed tributary of Campbell's Run. To provide for the crossing, appellant enclosed the stream with the sixty-foot long culvert and covered the culvert to grade level with earthen fill. The culvert is constructed of fifteen-inch plastic pipe for the first twenty-five feet from the upstream end and eighteen-inch pipe for the remainder of its sixty foot length. The earthen fill enclosing the culvert and supporting the road, ranges from a height of seven feet on the upstream end to twelve feet on the downstream end. The fill is fifteen feet wide and fifty feet long.

Appellant was unaware of the permit requirement for culverts until after he installed the culvert. He was advised to notify the DER of the existence of the culvert by a representative of the Westmoreland County Planning Commission, the planning body responsible for approving new subdivisions in this area.

A person who seeks a permit from the DER bears the burden of proving his entitlement to the permit. See 25 Pa. Code 21.101(c) and *High Sky, Inc. v. DER*, EHB Docket No. 79-015-B (issued April 23, 1980). In this case we find that

appellant has not met its burden of proof as the testimony shows that the culvert does not comply with the DER regulations governing their installation. The DER's regulations are concerned principally with assuring that culverts are securely constructed and have the capacity to carry the affected stream. See 25 Pa. Code 105 *et seq.* In particular, 25 Pa. Code 105.141 provides that a culvert that is installed in a rural area must be designed to accommodate a 25-year frequency flood flow. Appellant failed to make an engineering analysis of the capacity needed to handle the flow of the stream prior to installing the culvert; consequently, the culvert is too small. A hydraulic analysis of the stream and the area it drains performed by a DER hydraulic engineer shows that the culvert cannot handle a 25-year storm and in fact is not large enough to handle a 10-year storm, a 5-year storm or even a 2-year storm.[2]

There are two additional reasons for the DER denial and both result from the culvert being undersized. The culvert's failure to convey the total flow during periods of heavy rainfall will result in the backup of the stream and the DER engineers are of the opinion that the earthen fill lacks the stability to function as a dam and hold back the water. Also, water will impound to a depth of seven feet behind the fill before it overflows across the access road. At a seven-foot depth, a pool of water 100-feet long will be created and will extend onto the land of an adjacent property owner. Thus, the inability of the culvert to convey the stream during certain periods of heavy rainfall would result in a back-up of the stream onto a neighboring property and could result in a wash-out of the only access road to the future development.

---

2. The DER engineer who reviewed appellant's application testified that under the facts of this case he would advise the appellant to construct the culvert large enough to handle a 50-year storm.

The DER, in its review of an application for a Water Obstructions permit, is required to consider whether the facility described in the application comports with appropriate DER regulations and whether the facility will function in accord with the purpose of the Water Obstructions Act, *supra*. cf *The Kravitz Company v. DER*, 1978 EHB 224. If the application does not comply, the DER lacks the discretion to issue the permit. cf *Toby Creek Watershed Association Inc. v. DER and Doan Coal Company*, 1977 EHB 23. In as much as appellant's application fails to comply with 25 Pa. Code 105.141 of the DER regulations governing the construction of culverts and since appellant has not shown that the earthen fill emplaced across the stream is able to safely function as a dam, and since the pond resulting from back-up of the stream would flood the land of an adjacent property owner, we find that the DER had no discretion but to deny application No. 6578758 for a culvert to enclose the unnamed tributary of Campbell Run.

CONCLUSIONS OF LAW

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

2. Application No. 6578758 for a Water Obstructions permit to construct a culvert in an unnamed tributary of Campbell Run does not comply with 25 Pa. Code 105.141.

3. In reviewing an application for a water obstruction permit the DER is required to consider whether the facility described by the application comports with appropriate DER regulations and whether the facility will function in accordance with the Water Obstructions Act.

4. The DER does not have the authority to issue a water obstructions permit based on an application which does not comply with the DER's regulations.

O R D E R

AND NOW, this 23rd day of December, 1980, it is hereby ordered that the appellant's appeal is dismissed and the DER's refusal to issue a water obstructions permit based on appellant's application No. 6578758 is sustained.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: December 23, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

THOMAS E. SIEGEL : Docket No. 79-152-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This Opinion and Order pertains to Appellant Thomas E. Siegel's preliminary objections to the Department of Environmental Resources' (DER) petition to quash appeal. DER's petition to quash contends that the Board lacks jurisdiction over Siegel's appeal for reason that it was not filed within thirty (30) days of receipt of the DER's action as required by 25 Pa. Code 21.52 of the Board's rules.

Appellant, in its preliminary objections, contends that the petition to quash should be striken because it was not filed within twenty-one (21) days of the preceeding pleading, Appellant's appeal. Appellant argues that the petition to quash is in the nature of a preliminary objection and therefore must conform to Pa. Rule of Civil Procedure 1017 (a) (2) which requires that a preliminary objection must be filed within twenty-one (21) days of the preceeding pleading.

We disagree. A party may raise the question of a tribunal's jurisdiction over a matter at any time. In Borough of Grove City v. Commonwealth of

Pennsylvania, DER, EHB Docket No. 74-267-C (issued August 10, 1975) we stated that: "The law in Pennsylvania is clear that statutory appeal periods are jurisdictional and may not be waived. See Commonwealth v. Niemeyer Olds, Inc., 12 Commonwealth Ct. 388, 316 A.2d 152 (1974); Iannotta v. Phila. Trans. Co., 11 Commonwealth Ct. 156, 312 A.2d 475 (1973); General v. Roseman et al, 10 Commonwealth Ct. 569, 312 A.2d 609 (1973)." Therefore, Appeallant's preliminary objections are denied.

ORDER

AND NOW, this 11th day of January, 1980, it is hereby ordered that the Appellant's preliminary objections are denied. Appellant shall file an answer to DER's petition to quash appeal within 10 days after receipt of this order.

DER's request for oral argument is, at this time, denied. The DER may, if it desires to do so, again request oral argument after Appellant files its answer to the petition to quash appeal.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Lititation
Robert P. Ging, Jr., Esquire
Dom Greco, Esquire
Al Lander, Esquire

DATED: January 11, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

KENNETH G. & PAULINE E. GRUMBINE :

: Docket No. 79-151-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

On October 4, 1979, appellants Kenneth G. Grumbine and Pauline E. Grumbine filed an appeal from a sewage disposal plan approval of Bethel Township for eight (8) lots owned by Paul E. and Mary McCorkel in Lebanon County, Pennsylvania. Said approval occurred on September 13, 1979. On December 3, 1979, DER filed a motion to dismiss the appeal on grounds that DER had issued no decision or order which could be the basis of an appeal to this Board citing the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 *et seq.* and Chapter 71 of the Rules and Regulations of the Department, 25 Pa. Code § 71.15 (c)(3).

Appellants, by answer filed December 19, 1979, acknowledged that no action had been taken by DER but allege that unless this Board hears the appeal, they are virtually without remedy. The Pennsylvania Sewage Facilities Act, 35 P.S. 750.16 specifically provides that appeals such as here in question, be filed pursuant to the Local Agency Law, Act of December 2, 1968,

(P.L. 1133 No. 353) 53 P.S. §11306 now 42 Pa. C.S.A. 933(a)(2), which rests jurisdiction in the local Common Pleas Court. We therefore enter the following:

ORDER

AND NOW, this 23rd day of JANUARY 1980, after due consideration of the motion to dismiss the appeal in the above matter, the same is hereby granted.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

THOMAS M. BURKE
Member

cc: Bureau of Litigation

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES:

Lynn Wright, Esquire
Central Bureau of Litigation
503 Executive House
101 S. Second Street
Harrisburg, PA 17120

FOR APPELLANT/RESPONDENT/DEFENDANT:

Thomas A. Ehrgood, Esquire
Ehrgood & Ehrgood
Farmers Trust Building
Lebanon, PA 17042

DATED: January 23, 1980
lla

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GEORGE CAMPBELL, et al v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and ARTHUR H. SCOTT	Docket Nos. 76-117-B
LYNCOTT CORPORATION, ARTHUR H. SCOTT and SYBIL R. SCOTT v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	79-054-B
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION and ARTHUR H. SCOTT and SYBIL R. SCOTT	79-059-B
GEORGE CAMPBELL v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION	79-072-B
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION	79-121-B

OPINION AND ORDER

This opinion is dispositive of an array of pre-hearing motions and petitions filed by either Susquehanna County or Lyncott Corporation in five separate appeals before the Board concerning, in varied ways, a landfill operated by the

Lyncott Corporation in Susquehanna County. The pleadings, in general, result from Susquehanna County's quest for a forum to contest the landfill's existence and operation.

Docket No. 76-117-B

The appeal at Docket No. 76-117-B was filed by George Campbell and eleven other persons on September 3, 1976 from the issuance by DER of Solid Waste Permit No. 101025 and Industrial Waste Permit No. 5876201 to Arthur Scott. The permits approved the operation of the sanitary landfill on 70 acres of land in New Milford Township, Susquehanna County.

Susquehanna County ("County") has filed a petition to intervene in the appeal and Scott, in turn, has filed a motion to quash the County's petition to intervene and a motion for judgment on the pleadings.

Scott's motion for judgment on the pleadings contends that the appeal was terminated by a January 11, 1977 Order of Member Cohen. The January 11, 1977 Order was issued in response to an agreement between the parties at the conclusion of a supersedeas hearing and a subsequent stipulation of counsel. At the conclusion of an October 20, 1976 supersedeas hearing the following colloquoy took place:

> "THE BOARD: On the record. The parties to this proceeding have agreed as follows:
>
> Number one, that no Supersedeas will issue.
>
> Number two, that the Appellant and Intervenor shall submit to the Board within fourteen days herein a signed stipulation.
>
> Number three, upon receipt of that stipulation the Board shall enter an order terminating the Appeal.
>
> Is this what everyone understands?
>
> MR. PREATE: That's correct, your Honor.

MR. GAZDA: That is the way we understand it.

THE BOARD: So that everyone understands also that if it appears to the Board that after consulting the parties that such stipulation is not forthcoming, the Board will take appropriate action.

MR. PREATE: We will have it. I think you can rely on that.

THE BOARD: Is there anything to add by any of the parties?

(No response.)

THE BOARD: I declare this hearing closed."

On January 11, 1977 Board Member Cohen entered an Order based on the stipulation of counsel. The first paragraph of the Order required Scott to perform certain acts at the landfill. The second paragraph reads:

> "(2) Unless any party to the above captioned matter shall otherwise inform the board in writing on or before July 15, 1977, the board shall enter an order on or after that date marking this matter settled and discontinued. Pending the entry of such an order, this board shall retain jurisdiction in this matter and may enter supplemental orders, if necessary, to enforce the provisions of this order entered this 11th day of January, 1977."

On June 30, 1977 15 days before the date on which the appeal could be terminated through the terms of paragraph 2 the January 11, 1977 Order of Member Cohen, Scott requested an extension of time to comply with the requirements imposed upon him by the first paragraph of the January 11, 1977 Order. On July 20, 1977 and December 23, 1977 he submitted reports on the status of his compliance therewith. Because of Scott's request, the Board never issued an order terminating the appeal, and appellant, George Campbell on May 25, 1978 filed with the Board a request that the appeal be kept active because of an alleged improper operation of the landfill. Thus, the Board never issued an order terminating the appeal and in accord with paragraph 2 of the January 11, 1977 Order we retained jurisdiction.

The January 11, 1977 Order by Member Cohen was not a final order. It was interlocutory as it was issued by one Board Member to provide the mechanism, stipulated to by counsel, for later terminating the matter unless the Board was "informed" otherwise before July 15, 1977. Since Scott requested a postponement of the issuance of the final order before July 15, 1977 and later appellant, Campbell, objected to its issuance, a final order was never issued. Scott's motion for judgment on the pleadings is denied.

The County requests that it be permitted to intervene in this appeal from the issuance of permits to operate a solid waste disposal site within its boundaries because it "...involves issues related to solid waste management, water quality management, aesthetics and other environmental issues within the Township of New Milford, Susquehanna County, Pennsylvania, all of which has an impact upon the public interest and welfare of residents of said Township and County." The County avers that it has a potential financial involvement and interest for reason that the original plans, the operational plans and the operation of the landfill are inadequate to protect the environment and public from adverse impact and damages and thus the public could ultimately be stuck with the expense of reclamation and clean-up.

The County contends that its interest may be inadequately represented by the current parties of record because George Campbell et al may not have the financial resources to pursue the appeal and the DER "...initially issued the permit based upon faulty plans and have (sic) not adequately enforced the law relevant to the operation of the landfill...."

Scott opposes the County's request because: (1) it contravenes Environmental Hearing Board Rule of Procedure 21.62 which requires that leave to intervene "shall be filed prior to the initial presentation of evidence", and (2) the County lacks standing to intervene.

We interpret the phrase "initial presentation of evidence" in Board Rule 21.62 to refer to the hearing on the merits of the appeal. Otherwise, intervention would be unlikely in appeals where supersedeas hearings are held, as they are generally heard within seven days after an appeal is filed. See 25 Pa. Code 21.76. Therefore the County is not prohibited from intervening by Rule 21.62.

Scott contends that the County is not aggrieved because it does not meet the requirements for standing set forth by the Pennsylvania Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975). The Pennsylvania Supreme Court held that a party in order to have standing to appeal must show that its interest is substantial, immediate and direct.

We believe that appellant County meets the standing requirements established by *William Penn Parking Garage, Inc.* See our discussion of the County's standing to appeal at Docket No. 79-121, *infra*, p. 9. However, we need not decide that issue here, as a party seeking leave to intervene need not show that he would have had standing to file the original appeal. Board Rule 21.62(e) states that our rules on intervention supplement the General Rules of Administrative Procedure. Rule 31.3 provides the definition of "interveners" and states "admission as an intervener shall not be construed as recognition by the agency that such intervener has a direct interest in the proceeding or might be aggrieved by any order of the agency in such proceeding." Rule 35.28 provides that a petition to intervene may be filed by anyone claiming a right or interest "of such nature the intervention is necessary or appropriate", and such "right or interest may be...An interest...not adequately represented by existing parties" and "Any other interest of such nature that participation of the petitioner

may be in the public interest." See also *DER v. United States Steel Corporation*, EHB Docket No. 72-397 (Opinion and Order issued April 30, 1975) where we permitted intervention status "analagous to amicus curiae" to a citizens group even though the citizens group could not have instituted the original civil penalty action.

We find that the County does have a substantial interest in the outcome of this litigation and that the interest may not be adequately represented by the existing parties. We therefore grant the County's petition to intervene in the appeal of *George Campbell, et al v. DER and Arthur Scott*, EHB Docket No. 76-117-B.

Docket No. 79-054-B

The appeal docketed at EHB Docket No. 79-054-B is by Lyncott Corporation and Scott from an Order by DER dated April 27, 1979. The order alleges that Lyncott Corporation and Arthur Scott, a principle officer of Lyncott Corporation, have operated the landfill in New Milford Township, Susquehanna County in violation of the provisions of its Solid Waste Permit No. 101025 and it requires Lyncott Corporation and Scott to perform certain acts and to refrain from performing certain acts in order to cause the landfill to comply with the Solid Waste Management Act.

The County has filed a petition to intervene in the appeal of Lyncott Corporation from the DER April 27, 1979 Order. As grounds for intervention, petitioner County merely incorporated by reference the grounds supporting its petition to intervene in the Campbell appeal at Docket No. 76-117-B.

The County's petition to intervene in the appeal of Lyncott Corporation at Docket 76-117-B is denied. The County's objections to the existence of the landfill can be raised in the Campbell appeal at Docket No. 76-117-B. It would not

be appropriate nor would it serve judicial efficiency to litigate both the County's objections to the existence of the landfill and Lyncott's appeal contesting the propriety of the DER's enforcement order during the same proceeding, especially when the County has the opportunity to present those issues to the Board in the appeal at Docket No. 76-117-B.

Docket No. 79-059-B

The appeal filed at EHB Docket No. 79-059-B is by the County from the DER April 27, 1979 Order to Lyncott Corporation and Arthur Scott. The County, in its Notice of Appeal, states the reasons for its appeal of the DER order to Lyncott Corporation:

> "For the reasons stated in said April 27, 1979 Order as well as for reaons found in Appellant's 'Petition to Intervene' filed before this Honorable Board at Docket No. 76-117-B...the water quality as well as the solid waste permits involved in the instant matter should be revoked and full and complete reclamation at expense of Lyncott Corporation, Arthur H. Scott and/or Sybil R. Scott."

Lyncott has filed a "Motion to Dismiss Appeal" alleging that the County lacks standing to appeal the DER order. Lyncott again cites *William Penn Parking Garage, Inc. v. City of Pittsburgh, supra,* for the proposition that standing requires a "substantial interest" which is "direct and immediate". Lyncott persuasively argues that the County has no interest in an enforcement order from the DER to a third party requiring compliance with the law other than the abstract interest of all citizens in having others comply with the law.

It is apparent from the County's Notice of Appeal that its objection to the DER order is the method used by the DER to bring Lyncott into compliance with the Solid Waste Management Act. It prefers that the DER revoke the permits rather than order the imposition of a compliance schedule. Its preference however does

not confer standing to appeal. The method chosen by the DER to enforce its Solid Waste Management Act is discretionary with the DER and does not, as a matter of law, adversely affect the rights or interests of the County. In *George Eremic v. DER, et al*, EHB Docket No. 75-283-C (issued June 16, 1976, and re-issued December 2, 1976 after reconsideration) we held that the refusal of the DER to grant a request to revoke a solid waste management permit is not an appealable action because the DER's failure to act does not affect the rights of appellant. See also *Judith Frawley, et al v. Michael J. Dawning*, 26 Pa. Commonwealth Ct. 517, 364 A.2d 748 (1976) where the Commonwealth Court held that an agency's exercise of prosecutional discretion in deciding whether to press charges against persons it regulates is not adjudicatory in nature.

The County's reliance on our decision in *Newlin Township v. Commonwealth of Pennsylvania, Department of Environmental Resources et al*, EHB Docket No. 78-127-D (issued February 16, 1979) is misplaced. In *Newlin* we held that the municipal appellant had standing to contest a DER letter authorizing the operation of a landfill and to raise issues which we catagorized as "positive consequences of a negative enforcement action". However, the DER action, the letter, actually authorized the operation of the landfill.

The County has been granted intervention in the appeal at Docket No. 76-117-B challenging the propriety of DER's issuance of solid waste and water quality permits to operate the landfill. That is the appropriate forum to raise its objections to the landfill's existence. In fact, the County, when it listed its objections to the DER enforcement order, merely incorporated by reference the objections it listed at Docket No. 76-117-B.

As we have concluded that the DER order to Lyncott Corporation does not affect the County's rights, we dismiss its appeal, as supplemented, filed at EHB Docket No. 79-059.

EHB Docket No. 79-072-B

George Campbell has also filed an appeal (at EHB Docket No. 79-072) from the DER April 27, 1979 Order to Lyncott Corporation. Campbell objects to the terms of the order because, like the County, he believes it is not stringent enough, as it does not revoke Lyncott's permits.

Lyncott has filed a motion to dismiss. We sustain Lyncott's motion and dismiss the appeal for reason that appellant Campbell is not aggrieved by the DER order. The basis for our decision is the same as that given for our decision that the County is not adversely affected by the April 27, 1979 Order. Again, Campbell has the opportunity to raise the issues that it raises here in its appeal from the issuance of the permits at Docket No. 76-117-B.

EHB Docket No. 79-121-B

The DER on July 24, 1979 granted approval to the Stabatrol Corporation to dispose of specified chemical wastes at the Lyncott landfill in New Milford Township, Susquehanna County. The County has appealed this approval for the stated reason that: (1) Lyncott is not operating the landfill in accordance with law and, (2) DER does not have sufficient information on which to make a full and adequate evaluation of the affect of disposing of these chemicals at the landfill.

Lyncott Corporation, which is granted status as a party appellee because it is the landfill permittee, has filed a motion to dismiss the County's appeal on the grounds that the DER approval is not an appealable action and the County lacks standing to appeal the approval.

The action of the DER is an appealable action. It constitutes a final decision of the DER authorizing the disposal of wastes not previously authorized by the existing solid waste management permit, and it has the potential to have

environmentally significant consequences that could affect the personal or property rights of others. 25 Pa. Code 21.2 of the Board's Rules defines an action of the DER that may be appealed to include a modification of a permit. See also Section 2 of the Administrative Agency Law, the Act of June 4, 1945, P.L. 1388, *as amended*, 71 P.S. 1710.1 for the definition of "adjudication".

We agree with Lyncott that the County cannot raise the claims of individual property owners. Here, however, the County advances potential adverse consquences to its own interests. The County, as part of the allegations supporting its petition to intervene at EHB Docket No. 76-117-B and 79-054-B, states:

> "Clearly, DER's action in the instant case at least could prospectively affect Susquehanna County's municipal responsibilities to a significant degree. For example, (i) abatement of public nuisance; (ii) ownership of disposal site realty for delinquent taxes (see Municipal Claims and Tax Liens statute, 53 P.S. §§7101 et seq.), (iii) loss of tax revenue for loss of value to disposal site real property as well as realty adjacent to and near the disposal site property."

In *Newlin Township v. DER, supra*, we decided that a municipality had standing to appeal from a DER action which authorized the operation of a landfill within its borders. We stated:

> "Although this case presents a close question under the Commonwealth Court decisions, we believe that municipalities should have the right to appeal to this board where they are dissatisfied with a DER action that could prospectively affect their municipal responsibilities to a significant degree, and we will not abandon the board's practice by denying a right of appeal in this case...the township does have standing to appeal by virtue of its alleged interest in protection of surface and groundwater within its boarders.... In our view, a municipality may be more directly affected by an unlawful grant of a solid waste permit by DER than individual citizens, since it is the municipality rather than individual residents that could be called upon as a last resort to remedy any threat to the public health, welfare or safety that might be created within its jurisdiction."

For the reasons articulated in the Newlin Township case we believe the County has standing to appeal from the DER's approval to Stabatrol to dispose of the chemical wastes. Lyncott's motion to dismiss is denied.

The County has also moved to consolidate three of the aforementioned appeals; the appeal by Campbell from the issuance of the permits at Docket No. 76-117-B, the appeal by the County from the DER April 27, 1979 Enforcement Order at 79-059-B and Lyncott's appeal from the DER April 27, 1979 Order at 79-054-B. The County's appeal at 79-059-B has been dismissed by this Opinion and Order. We decline to consolidate the remaining two appeals for the reasons stated for not permitting the County and Campbell to intervene in the Lyncott appeal from the DER order; the propriety of the DER's action in issuing the permits presents entirely different issues than the validity of the April 27, 1979 Enforcement Order.

We do however believe that the appeal at Docket No. 76-117-B should be consolidated with the appeal at Docket No. 79-121-B since both appeals question the propriety of DER's approval to dispose of solid waste at the Milford Township site. Therefore, since the Board has the authority to order, on its own motion, the consolidation of matters which involve a common question of law or fact, we order the appeals at Docket No. 76-117-B and Docket No. 79-121-B consolidated under Docket No. 76-117-B.

In conclusion, the effect of the various appeals, petitions to intervene and motions to dismiss, is to separate these matters into two separate proceedings: (1) Docket No. 76-117-B, the appeal by the County and Campbell challenging the issuance by DER of the solid waste and water quality permits and approval to dispose of chemical wastes at the Milford Township site; and (2) Docket No. 79-054-B, the appeal by Lyncott from the DER's enforcement order.

ORDER

AND NOW, this 1st day of February, 1980, it is hereby ordered that:

1. The motion for judgment on the pleadings filed by Arthur Scott at EHB Docket No. 76-117-B is denied.

2. The petition to intervene filed by Susquehanna County at EHB Docket No. 76-117-B is granted.

3. The motion to quash Susquehanna County's petition to intervene filed by Arthur Scott at EHB Docket No. 76-117-B is denied.

4. The appeal of *Campbell, et al and Susquehanna County v. DER and Arthur Scott,* EHB Docket No. 76-117-B is consolidated with the appeal of *Susquehanna County v. DER and Lyncott Corporation,* EHB Docket No. 79-121-B; the caption shall read *George Campbell, et al and Susquehanna County v. DER and Arthur Scott and Lyncott Corporation,* EHB Docket No. 76-117-B.

5. The preliminary objection in the nature of a motion for a more specific pleading filed by Susquehanna County at EHB Docket No. 79-059-B is denied.

6. The motion to dismiss appeal of Susquehanna County filed by Lyncott Corporation, Arthur Scott and Sybil R. Scott at EHB Docket No. 79-059-B is granted.

7. The appeal of Susquehanna County Board of Commissioners, as supplemented, at EHB Docket No. 79-059-B is dismissed.

8. The request for admissions filed by Lyncott Corporation, Arthur Scott and Sybil R. Scott at EHB Docket No. 79-059 is stricken.

9. The petition for discovery filed by Susquehanna County at EHB Docket No. 79-059-B is stricken.

10. The motion to dismiss appeal of George Campbell filed by Lyncott Corporation, Arthur Scott and Sybil Scott at EHB Docket No. 79-072-B is granted.

11. The appeal of George Campbell at EHB Docket No. 79-072 is dismissed.

12. The petition to intervene filed by Susquehanna County at EHB Docket No. 79-054-B is denied.

13. The petition for discovery filed by Susquehanna County at EHB Docket No. 79-054-B is stricken.

14. The motion to dismiss appeal of Susquehanna County filed by Lyncott Corporation at EHB Docket No. 79-121-B is denied.

15. Lyncott Corporation, Arthur Scott and Sybil Scott and the DER shall file objections, if they chose to do so, to the petition for discovery filed by Susquehanna County at EHB Docket No. 76-117-B within fifteen (15) days after receipt of this order.

16. George Campbell and Susquehanna County shall file pre-hearing memoranda in the appeal at EHB Docket No. 76-117-B in accordance with the terms of pre-hearing order No. 1 issued in Docket No. 79-121-B, within thirty (30) days of receipt of the Order. The DER and Lyncott shall file answering pre-hearing memoranda within 15 days after receipt of appellants' pre-hearing memoranda.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: THOMAS M. BURKE
Member

DATED: February 1, 1980

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimaud, Esquire
Ernest J. Gazda, Sr., Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

E. ARTHUR THOMPSON, et al : Docket No. 79-185-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and RONALD S. MINTZ and PHILLIP MILLER, t/a
WICHARD-MILLER JOINT VENTURE, and WICHARD SEWER
COMPANY, INC., Intervernors

OPINION AND ORDER SUR MOTION
TO QUASH REQUEST FOR SUPERSEDEAS HEARING

Intervenors, Ronald S. Mintz and Philip Miller t/a Wichard-Miller Joint Venture and Wichard Sewer Company, Inc. have filed a motion to quash appellants' request for a supersedeas from a DER action approving a revision to the Horsham Township Official Sewage Facilities Plan ("Official Plan"). Intervenors contend that appellants cannot, as a matter of law, suffer irreparable harm from the Department of Environmental Resources ("DER") action nor can they show a likelihood of injury to the public, during the pendency of the hearing on the merits, and therefore appellants cannot

meet the standards for the grant of a supersedeas set forth in Board Rule 21.78 (25 Pa. Code 21.78).[1]

Appellants, residents of Horsham Township, Montgomery County, have appealed DER's approval of a revision to the Horsham Township's Official Plan which allows the construction of a package sewage treatment plant. Appellants object to the construction of the package sewage treatment plant because, they contend, *inter alia*, that its discharge will be to "Park Creek in a conservation area without the environmental consideration required by Article I, Section 27 of the Pennsylvania Constitution", and its construction could result in the loss of federal funds for a sewer project in adjacent areas of Horsham Township. Simultaneous with the filing of its appeal, appellants filed a request for supersedeas.

---

1. 25 Pa. Code 21.78 states:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner;
>
> (2) the likelihood of the petitioner's prevailing on the merits; and
>
> (3) the likelihood of injury to the public.
>
> (b) A supersedeas shall not issue in cases where nuisance or significant (more than *de minimis*) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.
>
> (c) In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a bond or other security.

We grant intervenors' motion to quash the petition for supersedeas because we agree that appellants will not suffer harm from the DER approval during the pendency of the hearing on the merits. The DER action only constitutes a planning approval, it does not permit the actual construction of the objected to sewer facilities. Intervenors still must apply for and receive a Clean Streams Law Permit ("CSL permit") prior to construction of the package plant. The only affect of a supersedeas would be to stop the DER from processing the application for the CSL permit(s). In DER's letter notifying Horsham Township of the approval of the revision request, it stated: "This planning approval does not relieve the project sponser of the responsibility to secure a Department permit for the construction and operation of the proposed facility."

If the DER issues a CSL permit allowing construction of the sewer facilities prior to a final decision on the merits of this appeal, appellants can at that time either petition for a supersedeas from the issuance of the CSL permit or revive its petition for a supersedeas in this appeal.

O R D E R

AND NOW, this 7th day of February, 1980, it is hereby ordered:

1. Intervenors' motion to quash request for supersedeas hearing is granted;

2. Appellants' request for supersedeas is denied;

3. When and if a Clean Streams Law Permit is issued by the DER to construct the sewage facilities which are the subject of the Official Sewage Plan revision, notice shall be given to appellants; and

4. The hearings on appellants' request for supersedeas set for February 14 and 15, 1980 are cancelled.

ENVIRONMENTAL HEARING BOARD

THOMAS M. BURKE
Member

DATED: February 7, 1980

cc: Bureau of Litigation
Randall J. Brubaker, Esquire
Mr. E. Arthur Thompson
Herbert K. Sudfeld, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

NY-TREX, INC. : Docket No. 79-178-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Appellant, Ny-Trex, Inc., petitions this Board for a supersedeas from an order of the Department of Environmental Resources ("DER") issued under the Solid Waste Management Act, the Act of July 31, 1968, P.L. 788 *as amended*, 35 P.S. 6001 *et seq.*, The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. 691.1 *et seq.* and Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. 510-17.

The DER has issued an order to petitioner alleging that petitioner has disposed of sewage sludge wastes from municipalities, including the City of Detriot, Michigan, at various sites in Pennsylvania without a solid waste permit. The order prohibits petitioner from transporting and disposing of sewage sludge wastes and industrial wastes until it procures a permit

or approval from the DER. The order also requires petitioner to provide the DER with information on the sites where it deposited wastes and the composition of the wastes. Specifically, paragraph 2 of the order requires petitioner to provide DER with the following information:

> "Ny-trex shall provide the following information to the Department for each location within the Commonwealth at which Ny-Trex has at any time discharged, spilled, disposed of, or otherwise deposited solid waste in the form of sewage sludge or industrial waste:
>
> (a) a description of each location, giving sufficient detail to allow a person to find such location on a map without difficulty (identify USGS Quandrangle and latitudinal and longitudinal numbers);
>
> (b) the date of each discharge, spill, disposal or depositing, corresponding to each location;
>
> (c) the chemical composition of the solid waste deposited on each date at each location;
>
> (d) the amount of such solid waste deposited on each date at each location;
>
> (e) the area over which the solid waste was deposited on each date at each location;
>
> (f) the origin of the solid waste deposited on each date at each location;
>
> (g) the weather at the time of depositing on each date at each location;
>
> (h) the ownership of the property of each location on which the solid waste was deposited;
>
> (i) the names and locations of all municipalities, municipal authorities and persons in Pennsylvania from which Ny-Trex has received such solid waste; for each municipality, municipal authority or person, give the dates on which Ny-Trex received such solid waste, and for each date, give the quantity and chemical description of the solid waste received; and

(j) the names and locations of all municipalities, municipal authorities and persons outside of Pennsylvania from which Ny-Trex transported such solid waste into Pennsylvania and whose solid waste Ny-Trex deposited in Pennsylvania; for each municipality, municipal authority or person, give the dates on which Ny-Trex received such solid waste, and for each date, give the quantity and chemical description of the solid waste received."

Petitioner has appealed the order to this Board and has simultaneously filed a petition for a supersedeas from the provisions of the order requiring the submission of the aforesaid information. A hearing on the petition was scheduled for December 7, 1979. At that time petitioner declined to present evidence in support of its petition. Instead, it presented argument that the supersedeas should be issued for reason that the order, as a matter of law, was void *ab initio* because: (a) it was issued without express statutory authority; (b) it deprives petitioner of its Fourth and Fourteenth Amendment rights; and (c) it violates the Fifth Amendment of the U.S. Constitution. We reserved ruling on the petition for supersedeas pending the submission of briefs by the parties. Since petitioner declined to present evidence in support of the issuance of a supersedeas we may issue a supersedeas only if we determine that the DER did not have the authority to issue the order or the order, on its face, violates the constitutional rights of petitioner. See Rule 21.78 of the Board's Rules of Procedure.

Petitioner, in its brief, argues that the DER order is unlawful and void because it was issued without express statutory authority.

The order was issued under Section 6(9) of the Solid Waste Management Act, and Sections 10(d)(3) and 610 of The Clean Streams Law; these sections grant to DER the power to issue orders necessary to implement the provisions of the acts.

The stated purpose of the Solid Waste Management Act is to prevent public health hazards from improper waste disposal practices and the purpose of The Clean Streams Law is to protect Commonwealth waters, including ground waters, from substances which cause pollution. The information required by the order, the location of the disposal sites and the composition of the wastes, is obviously necessary to alleviate or correct any pollutional problems resulting from the alleged disposal activities, and as such constitutes a reasonable response to the activities alleged by the order. Thus the order, has apparent statutory authorization.

Nevertheless, appellant argues that the DER does not have the authority to issue the order because the DER action, although dubbed an order by the DER, is in reality "a transparent attempt to obtain information, documents and records of Petitioner in the manner of a subpoena *duces tecum*" and the DER has never been granted subpoena powers. We agree that the DER has not been granted the power of subpoena; but we do not agree that the DER order can be construed as a subpoena *duces tecum*. A provision in an order requiring the submission of information does not transform it into a subpoena *duces tecum*; it still differs from a subpoena *duces tecum* in purpose, authorization and effect.

An order's purpose is remedial, it establishes present rights and obligations based on past duties and liabilities. Typically, its requirements are based on accusatory determinations such as unlawful past conduct or an existing or threatened hazardous activity. The requirements imposed by the order must be reasonably related to these determinations and must be reasonably necessary to insure the protection of the public.

In contrast, the purpose of a subpoena is noncriminal investigation; the procurement of information from those who best can give it and are most interested in not doing so. Its validity is not dependent upon a showing of

the existence of unlawful practices or hazardous activities. It is valid if its demand is not vague and the information sought is reasonably relevant to the purpose of its enabling legislation. *United States v. Morton Salt Company*, 338 U.S. 632, 652, 70 S. Ct. 357, 369, 94 L. Ed. 401 (1950).

An order, as an adjudication of an adminstration agency, must have its findings supported by substantial evidence and the burden of establishing same rests upon the issuing agency. A subpoena is valid unless the person resisting it shows that it constitutes an abusive exercise of authority. *U.S. v. Powell*, 379 U.S. 48 (1964). Also, an administrative order can be self-enforcing, as criminal penalties are available to sanction noncompliance therewith. Disobedience with an administrative subpoena however is not a crime. Enforcement must be sought from a court.

We find that the requirement to submit information imposed upon petitioner by the DER's October 29, 1979 Order cannot be characterized as a subpoena *duces tecum*. Rather, it is a reasonable, and possibly necessary, consequence of the allegations in the order. The truth of those allegations will of course be a subject of the hearing on the merits.

Appellant also contends that the DER October 29, 1979 Order is violative of the Fourth Amendment to the Constitution of the United States because the order is, "in essence, a search warrant". Appellant's contention is spurious. The order under appeal does not involve a "search". In terms of Fourth Amendment safeguards, the term "search" has been generally defined as "an examination of a man's house, buildings or of his person, with a view to the discovery of contraband or some evidence of guilt to be used with prosecution of a criminal action", *Commonwealth v. Calvanese*, 199 Pa. Super. Ct. 395, 185 A.2d 657 (1962). The order does not seek entry into appellant's

home or business office for records. Rather, it requires appellant to produce information. This type of order has been upheld by the United States Supreme Court as not violative of the Fourth Amendment. See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) where the court cautioned against confusing a "figurative" or "constructive" search with an "actual search and seizure".

Finally, appellant contends that the order is invalid because it infringes on the Fifth Amendment right against self-incrimination. In answer, it suffices to state that appellant corporation has no Fifth Amendment rights and a corporation has no standing to assert the Fifth Amendment rights of its officers, employees or agents. *George Campbell Painting Corporation v. Reid*, 392 U.S. 286 (1968); *Commonwealth v. Butler*, 448 Pa. 128, 291 A.2d 89 (1972).

We find that the DER has the statutory authority to issue the order under appeal and that petitioners objections to the constitutionality of the order are unsupported by law and thus petitioner has failed to show how it will be irreparably harmed if the order is not superseded pending the hearing on the merits.

O R D E R

AND NOW, this 20th day of February , 1980, it is hereby ordered that Ny-Trex, Inc.'s petition for supersedeas from the October 29, 1979 Order of the DER is denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation
Michele Straube, Esquire
Stanley R. Geary, Esquire
Gregg M. Rosen, Esquire

DATED: February 20, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

PENNSYLVANIA ENVIRONMENTAL MANAGEMENT SERVICES, INC. :

Docket No. 79-118-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MIDDLE PAXTON TOWNSHIP CONCERNED CITIZENS
and TOWNSHIP OF MIDDLE PAXTON, Intervenors

OPINION AND ORDER
SUR
MOTION FOR REMAND

DER has filed a Motion for Remand in the above matter which was scheduled for hearing on March 5, 6 and 7, 1980. The original appeal was filed on August 15, 1979, by Pennsylvania Environmental Management Services, Inc. (PEMS), after DER denied its application for a solid waste management permit pursuant to the Pennsylvania Solid Waste Management Act, the Act of July 31, 1968, No. 241, P.L. 788, *as amended*, 35 P.S. 6001, *et seq.*

The basis for the denial was a very limited one, concerning a leachate disposal system and the technical problems involved therein. The Board allowed the intervention of two additional parties, Middle Paxton Township and Middle Paxton Township Concerned Citizens, but ruled that they were generally limited to the narrow issue then before the Board on appeal. A previous effort by appellant to have the case remanded failed because DER was

opposed to any further review on the present application. The matter has now gone full circle. DER desires to conduct further review of the application in light of Article I, Section 27 of the Pennsylvania Constitution and appellant, PEMS, raises objection thereto.

PEMS argues in its well-conceived brief, that not only did DER know about the Article I, Section 27 issues many months ago, but that this Board is legally able to resolve any technical questions thus involved, citing appropriately *Warren Sand & Gravel v. DER*, 20 Pa. Cmwlth. 186, *West Penn Power Co. v. DER*, 74 D & C 2d. 627 and other cases. The Board agrees with appellant, that DER was certainly well aware of the issues it now desires to further review, arising under our constitution, from the very beginning of this controversy. If this were the full story, the requested remand would have to be denied. The problem, however, is that the issues under Article I, Section 27 in their broad sense are not presently before the Board on this appeal. This is true because appellant did not raise them, and we have previously ruled that Intervenors could not do so at this stage of the proceedings. Because at some point these important issues must be faced, we see no reason why it should not be done now, and appropriately by DER in the first instance and then this Board only on review should that become necessary.

The Board will retain jurisdiction over this matter and remand it to DER for any further review it deems appropriate in light of Article I, Section 27 of the Pennsylvania Constitution.

O R D E R

AND NOW, this 6th day of MARCH 1980, after due consideration of the Motion to Remand the above matter to DER, the same is hereby granted for a period not to exceed sixty (60) days except by further order of this Board.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES:
John R. Embick, Esquire

FOR APPELLANT/RESPONDENT/DEFENDANT:
Hershel J. Richman, Esquire

FOR INTERVENORS:
Michael Q. Davis, Esquire
Jeffrey A. Ernico, Esquire
Linus E. Fenicle, Esquire

DATED: March 6, 1980
lla

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

THOMAS E. SIEGEL : Docket No. 79-152-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO QUASH APPEAL

The Department of Environmental Resources ("DER") has filed a petition to quash appeal in which it alleges that this Board lacks jurisdiction over the appeal of Thomas E. Siegel because it was not filed within the required time period.

The DER issued Mine Drainage Permit No. 3678BC21 to appellant, Thomas E. Siegel, on August 22, 1979 for a surface mine operation in Monroe Township, Clarion County. The permit contains a special condition No. 4 which prohibits the mining of the upper and lower Clarion seams of coal. Appellant objected to the inclusion of special condition No. 4 in a letter to D. R. Thompson, Chief of the Mine Drainage Control and Reclamation Division of the Bureau of Surface Mine Control. The letter stated that appellant was appealing the inclusion of the special condition and requested that a hearing be held on the matter. Thompson responded to appellant's September 4, 1979 letter and other

inquiries objecting to the special condition by a letter dated September 14, 1979 which reads:

> "Dear Mr. Siegel:
>
> In response to your September 4, 1979 letter you objected to the Department's elimination of the Upper and Lower Clarion coals from your application for mining.
>
> I discussed this with Mr. Merritt, Chief of our Coal Section and he stated that he had talked to you about this. He told me that he told you to appeal your objection before the Environmental Hearing Board.
>
> In order to get this resolved you should make a formal appeal to the Environmental Hearing Board as soon as possible. The Board's hearing calendar is usually quite heavy with cases.
>
> This is the most effective way to correct the problem.
>
> Sincerely,
>
> D. R. Thompson, Chief
> Division of Mine Drainage
> Control and Reclamation"

Appellant on October 5, 1979 filed an appeal with this Board from Thompson's September 14, 1979 letter. His notice of appeal characterizes Thompson's letter as "a denial of a request to remove additional special condition No. 4 from Mine Drainage Permit No. 3678BC21.

The DER contends that Siegel's appeal was untimely filed because it was filed more than thirty days from the date he received the Mine Drainage Permit and the issuance of the permit, and not the Thompson September 14, 1979 letter, is the DER action which affected appellant's rights. Section 21.52 of the Board's Rules provides that an appeal must be filed with the Board within thirty days after the DER has received written notice of the DER action for the

jurisdiction of the Board to attach. Board Rule 21.2 defines action as a determination by the DER affecting personal or property rights.

We agree with the DER that the September 14, 1979 letter from Thompson is not an appealable action. It does not affect the rights of appellant. Appellant was required to abide by special condition No. 4 before and after he received the letter; the letter had no effect on his status. It merely acknowledged receipt of appellant's September 4 letter and advised appellant to file an appeal to the EHB. See *Standard Lime and Refractories Co. v. DER*, 2 Pa. Commonwealth Ct. 437, 279 A.2d 383 (1971) where the court held that "a letter from a governmental department head that in his opinion the appellant has not compiled (with the Air Pollution Control Act) and therefore the matter will be referred to the agency's counsel, is not an adjudication from which an appeal may be taken." Id, 379 A.2d at 386. The adjudicatory action of the DER, the action affecting appellant's rights, was the issuance of the permit with special condition No. 4.

Appellant argues, in the alternative, that if the action being appealed is the Mine Drainage Permit, the September 14, 1979 letter from Thompson "must be construed in good faith as an extension or waiver of the thirty (30) day appeal time" because it terminated negotiations between the DER and appellant.

We are unable to construe Thompson's September 14, 1979 letter as either an extension of time or a waiver of timely filing. Furthermore, Board Rule 21.52 is mandatory, not directory. *Lebanon County Sewage Council v. DER*, 34 Pa. Commonwealth Ct. 244, 382 A.2d 1310, (1978). Thus the Board, and certainly the DER, lack the authority to extend or waive the 30-day appeal period.

Also, appellant is incorrect in its assertion that "this Board has authority under Rule 21.53 to consider this appeal because of appellant's good faith efforts to resolve this issue and controversy."

Rule 21.53 reads:

> "The Board upon written request and for good cause shown may grant leave for the filing of an appeal *nunc pro tunc*; the standards applicable to what constitutes good cause shall be the common law standards applicable in analagous cases in Court of Common Pleas in the Commonwealth."

The Courts have often stated that the time for taking an appeal cannot be extended as a matter of grace or mere indulgence. *West Penn Power Co. v. Goddard*, 460 Pa. 551, 333 A.2d 909 (1975) and *Dixon Estate*, 443 Pa. 303, 279 A.2d 39 (1971). Appeals *nunc pro tunc* have been allowed only where there is fraud or some breakdown in the court's operation through a default of its officers, *West Penn Power Co. v. Goddard, supra, Rostosky v. Dept. of Environmental Resources*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976). The court in *Rostosky* stated:

> "Our power to allow an appeal *nunc pro tunc* is severely limited [A]ny such allowance must be based on extraordinary conditions and must involve fraud or some breakdown in the court's operation though a default of its officers, whereby the party has been injured. *In re Township of Franklin*, 2 Pa. Cmwlth. 496, 500, 276 A.2d 549, 551 (1971).
>
> "Finally, it is claimed that injustice will result if the right to appeal is denied. Appellant asserts that the DER has suffered no substantial prejudice. He cites Pa.R.C.P. 126 and attempts an analogy to the liberal transfer rules of the Appellate Court Jurisdiction Act. This court has already addressed such an argument.
>
> "[A]ppellants contend that we should allow their appeals in the interests of justice. This argument assumes incorrectly that we have discretion in the matter. Failure to perfect an appeal within the time allowed by statute is a defect in the proceeding of which the appellate court must take notice, even on its own motion. We have no power to extend the time limit for filing an appeal. *City of Pittsburgh v. Pennsylvania Public Utility Commission*, 3 Pa. Cmwlth. 546, 552, 284 A.2d 808, 811 (1971)."
>
> ID. 364 A.2d at 763, 764

For these reasons we find that appellant's notice of appeal was not filed within the 30-day appeal period. Since we lack the discretion to enlarge the appeal period, we have no jurisdiction to entertain the appeal.

O R D E R

AND NOW, this 10th day of March, 1980, the DER's petition to quash appeal is granted. The appeal of Thomas E. Siegel at this docket is hereby quashed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

BY: THOMAS M. BURKE
Member

DATED: March 10, 1980

cc: Bureau of Litigation
Robert P. Ging, Esquire
Dom Greco, Esquire
Al Lander, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SPRINGETTSBURY TOWNSHIP WEST YORK BOROUGH WRIGHTSVILLE BOROUGH YORK TOWNSHIP JACOBUS BOROUGH	:	Docket No. 75-132-W " 75-139-W " 75-141-W " 75-142-W
v.	:	" 75-143-W

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

AMENDED ADJUDICATION
AND
O R D E R

This matter was decided by the Board on January 13. 1976, and was then appealed to the Commonwealth Court. The Board, among other things, concluded that under the facts of the case, DER did not have the authority to issue an order requiring that the solid waste management plan here in-dispute, be implemented. The Commonwealth Court reversed the Board, on October 20, 1976 and remanded, holding that DER did have the authority to order implementation.

There are no new issues being raised by the parties and the status quo has been otherwise maintained since our first adjudication.

In accordance with the above indicated decision, we enter the following:

O R D E R

AND NOW, this 21st day of MARCH 1980. the orders issued by DER on March 7, 1975, in the above matters are hereby upheld and there being no other issues before the Board over which we have jurisdiction. the appeals are dismissed.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARIMENT OF ENVIRONMENTAL RESOURCES:

Peter Shelley, Esquire

FOR APPELLANT/RESPONDENT/DEFENDANT:

Raymond L. Hovis, Esquire

Donald H. Yost, Esquire

DATED: March 21, 1980
lla

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

JOHNSON S. BAUM

Docket No. 79-163-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO QUASH APPEAL

On October 9, 1979, DER denied an application for a stream encroachment permit filed by appellant, Johnson S. Baum. On October 18, 1979, the Board received a letter from appellant which requested necessary appeal forms and stated: "I am certain that there is a misunderstanding on their part therefore I wish to appeal their decision and explain my reasons at this time." Mr. Baum did not have the benefit of counsel and on October 23, 1979, was sent an Acknowledgment of Appeal and Request for Additional Information.[1] This form advised appellant that he should send the information as required on the Notice of Appeal

1. This Acknowlegment was also sent, in error, to Marcon, Inc., permittee in another matter, unrelated to this case.

form which was also sent to him, along with our Rules and Regulations. No response having been received by November 28, 1979, the Board sent a certified letter to appellant reminding him of the previous communication and stating: "Please be advised that unless there is compliance by Friday, December 7, 1979, the Board may apply sanctions under Rule 21.124. Those sanctions may include dismissal of the appeal or a default adjudication against the party in default."

On December 6, 1979, appellant filed the Notice of Appeal form with all the necessary information previously requested. The Board Rules provide at §21.52: ". . .(c) An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51[2] of this title will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal."

We are satisfied that appellant has met the requirements of our Rules in filing his appeal. That it was done without counsel has not been overlooked, and we must deny the Motion to Quash.

O R D E R

AND NOW, this 26th day of MARCH 1980, after due consideration of the Motion to Quash the above captioned appeal, the same is hereby denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Mr. Johnson S. Baum, Esquire

2. Rule 21.51 provides that a written appeal notice be filed and §21.52 requires that this be done within thirty (30) days after the action being appealed.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROBERT L. SNYDER and JESSIE M. SNYDER, et al :

Docket No. 79-201-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The Department of Environmental Resources has filed a Petition for Discovery with this Board requesting that Appellants Robert L. and Jessie M. Snyder (Snyder) and A.H. & R.S. Coal Corporation (Coal Co.) be ordered to answer certain interrogatories and respond to a Request for Admissions. The petition also requests permission to depose Sanford M. Lampl, Esquire and Robert G. Sable, Esquire, counsel for the Coal Co. Snyder and the Coal Co. have both filed answers objecting to parts of the discovery request.

Initially, both Snyder and the Coal Co. object to the relevancy of certain interrogatories requesting information on the appellants' financial condition and relationships with other entities. Specifically, Interrogatories C, D, E & F of Interrogatories directed to Snyder and Interrogatories A, B, C, D, & E of the Interrogatories directed to the Coal Co. are objected to as being irrelevant to these appeals.

Interrogatories C, D, E & F to Snyder request information on entities other than the Coal Co. that Snyder may have an interest in, or

performs work for as an independent contractor, income that Snyder might receive from any other entity and Snyder's financial status. The Interrogatories to the Coal Co. requests the following information:

A. Salary of officers of the Coal Co. from the Coal Co. and others,

B. Compensation of the directors of the Coal Co. from the Coal Co.,

C. Identity of the stockholders of the Coal Co. and the value of the stock,

D. Identity of all mining operations conducted by the Coal Co. during the past seven (7) years and identity of persons who had an interest in the mining sites,

E. Financial status of Coal Co.,

F. Activities engaged in by the Coal Co. other than the mining and washing of coal.

Appellants' objection to the relevancy of the information requested by the Interrogatories is well taken. The subject of these appeals concerns the validity of DER's action forfieting bonds posted by the Coal Co. because of the Coal Company's alleged failure to reclaim sites on which it had performed mining activities. We fail to see how the information sought by the DER is relevant to either the basis of the DER's action or Appellants' defense thereto, or how the information could lead to the discovery of admissable evidence. Relevancy is applied very liberally under the discoveryrules of the Pa. R.C.P. Information is relevant so long as it "appears reasonably calculated to lead to the discovery of admissable evidence." See Pa. R.C.P. 4003.1. Nevertheless, there must be some connection between the subject of the appeal and the information requested. See *Pennsbury Village Condominium v. DER*, EHB Docket No. 76-028-C (Opinion and Order issued July 12, 1976) and *Sharon Steel Corp. v. DER*, EHB Docket No. 78-058-B (Opinion and Order issued August 7, 1978) wherein we denied discovery because it was clearly irrelevant.

Before acting on Appellants' objections, we will give the DER the opportunity to explain the relevancy of the Interrogatories. The DER therefore is granted ten days to submit a statement explaining relevancy of the aforesaid Interrogatories.

Appellant, Coal Co. also objects to the DER's request to depose Robert Sable, Esquire and Sanford Lampl, Esquire, counsel for Appellant, Coal Co. on the basis of the attorney-client privilege. Normally we would look with disfavor upon a request to depose counsel. See *Daset Mining Co. v. DER*, EHB Docket No. 78-102-B, 79-112-B and 79-113-B (Opinion and Order issued June 13, 1979). Here, however, the DER has a legitimate purpose as Sable and Lampl have been listed as witnesses by the Coal Co. in its pre-hearing memorandum. Thus, they apparently have knowledge of facts separate from any gained through an attorney-client communication.

Appellant, Snyder's, objection to Request for Admission 2 and 44 as irrelevant is overruled. It does not appear that the information requested is manifestly irrelevant.

ORDER

AND NOW, this 25th day of APRIL 1980, it is hereby ordered that:

1. Appellant, Robert L. and Jessie M. Snyder, and Appellant A.H. & R.S. Coal Corporation, shall respond to the Request for Admissions attached to the DER's Petition for Discovery in accordance with Pennsylvania Rule of Civil Procedure 4014.

2. DER's request to depose Sanford M. Lampl and Robert G. Sable is granted.

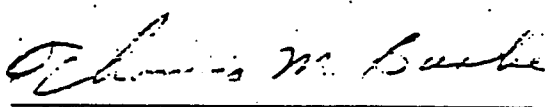
3. The DER shall file a statement within ten (10) days of receipt of this order setting forth the reasons it believes that the answers to the following Interrogatories are relevant to this appeal:

A. Interrogatories to Robert L. & Jessie M. Snyder Nos. C, D, E & F.
B. Interrogatories to A.H. & R.S. Coal Co. Nos. A(4)-(7), B(2)-(6), C(2)-(7), D, E and F.

4. Appellant Robert L. and Jessie M. Snyder shall answer Interrogatories A, B and G under oath or affirmation within thirty (30) days of receipt of this order.

5. Appellant A.H. & R.S. Coal Co. shall answer Interrogatories A(1)-(3), B(1), C(1) and G through JJ under oath or affirmation within thirty (30) days of receipt of this order.

ENVIRONMENTAL HEARING BOARD



THOMAS M. BURKE
Member

cc: Bureau of Litigation

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES:

Howard J. Wein, Esquire

FOR APPELLANT/RESPONDENT/DEFENDANT:

Richard S. Dorfzaun, Esquire
Mark L. Glosser, Esquire

DATED: April 25, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COMPASS DEVELOPMENT, INC.

Docket No. 80-026-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

ORDER AND OPINION

This matter is before the Board on a Motion to Dismiss filed by the Department of Environmental Resources (DER).

Compass Development, Inc., Appellant here, has appealed a determination by the DER of noncompliance by Appellant with a Consent Order and Agreement (Consent Order) entered into between DER and Appellant on August 23, 1979. The Consent Order provides for the assessment of specifically enumerated penalties against Appellant in the event that Appellant fails to comply with certain provisions of the Consent Order.

The Consent Order sets forth limitations on Appellants' rights of judicial review of a DER determination of noncompliance. One of the limitations requires that an appeal from a determination of noncompliance by DER must be filed with the Environmental Hearing Board within fifteen days after receipt of written notice of the DER's findings.

Appellant's appeal, which was lodged with the Board on February 8, 1980, is from a DER letter dated January 24, 1980, which alleges that a DER inspection found certain instances of noncompliance by Appellant with

the Consent Order and, as a consequence, Appellant must pay the previously agreed to penalty. DER, in its motion, contends that the appeal is untimely because Appellant was initially advised of the determination of noncompliance by a letter from the DER dated January 4, 1980.

The issue that is determinative here is whether the January 4, 1980, letter constitutes written notification of the DER's finding of noncompliance and thus starts the running of the fifteen-day appeal period.

A person can legally sign an agreement abrogating or limiting its rights to contest the assessment of a penalty. See *Swarb v. Lennox*, 405 U.S. 191, 31 92 S. Ct. 767, L. Ed. 2d 138 (1972) and *D. P. Overmyer Co. Inc. of Ohio v. Frick Co.*, 405 U.S. 180, 92 S. Ct. 775, 31 L. Ed. 2d 124 (1972). However the waiver must be voluntary, knowingly and intelligently made. *Brady v. United States*, 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). Here, there is no dispute over the Appellant's voluntary acquiescence in the agreement; however, the January 4, 1980, letter which the DER contends effectuates the waiver by providing the requisite notice, must also be clear and explicit. If there is doubt as to the occurrence of the notice, the doubt must be resolved against the person in whose favor the waiver operates. See *Kline v. Marianne Germantown Corp.*, 438 Pa. 41, 263 A.2d 362, (1970) and *Scott Factors, Inc. v. Hartley*, 425 Pa. 290, 228 A.2d 887 (1967).

The January 4, 1980, letter from the DER to Appellant reads in pertinent part as follows:

> "Gentlemen:
>
> "I have just received your letter dated December 31, 1979 concerning our field inspection of your sites which took place on that day. While we agree that you have done considerable work in implementation of your Soil Erosion and Sedimentation Control Plan, additional work is needed before all items are corrected. As we discussed with you at some length after the inspection, additional work is needed in the Dawson Run, Hunter Road, Spring Run, and Triangle Lease areas before we can consider you to be in compliance with our Consent Order

and Agreement. We recognize that some of the final stabilization cannot be completed until Spring of 1980. Therefore, compliance with the Consent Order and Agreement is not likely before that time."

* * *

"Final stabilization, including seeding, of the various areas, cannot be done until Spring, according to your plan. We recognize that compliance with the Consent Order and Agreement is therefore delayed due to the time of year. We want to assure that completion of the work is realized. We also are aware of the increasing penalties as a result of your non-compliance with the Consent Order and Agreement. As discussed with you immediately after the inspection, we will be sending to you, in the near future, proposed modifications to the Consent Order and Agreement to address these concerns.

"Your continued cooperation in resolution of this matter is anticipated. If you have any questions regarding the foregoing, do not hesitate to contact us.

Sincerely,

James E. Erb, P.E.
Regional Water Quality Manager
Bureau of Water Quality Management
Meadville Regional Office"

We find the January 4, 1980, letter to be, at best, ambiguous as to Appellant's obligation for penalties under the Consent Order, especially when read in the context of surrounding events. The DER had previously granted Appellant an extension of time to perform the work because DER believed Appellant was proceeding in a conscientous manner. Also, the DER's January 4, 1980, letter was in response to a letter dated December 31, 1979, in which Appellant proffered its impression of the December 31, 1979, inspection. The letter reads:

"Gentlemen:

"This is to confirm your field inspection of December 31, 1979, at the Compass Development, Inc. sites.

"It was our general impression from talking with you and your representatives that the sites tended to be in general compliance with the Consent Agreement and the Soil Erosion and Sedimentation Control Plan, with some minor items to be corrected.

"This is to inform you that Compass Development, Inc. will continue to upgrade all sites, as weather permits, throughout the Winter months so as to minimize any siltation that might result from Spring runoffs.

"It was our understanding that, with this inspection, the compliance of our Consent Agreement has been achieved and that no further legal action will result as long as Compass remains in compliance.

Very truly yours,
COMPASS DEVELOPMENT, INC.
Tionesta, Pennsylvania

James J. McMahon
Operations Manager"

Considering the aforesaid, the January 4, 1980 letter can reasonably be read to say that Appellant has cooperated and performed considerable work at the site and that since additional work must wait until Spring, the DER is willing to modify the Consent Order rather than assessing a $500.00 per day penalty until Spring.

It is hard to believe that Appellant, who apparently has been represented by counsel in its dealings with the DER at least since August 1979, would not file an appeal if it had recognized the January 4 letter as a notification of the assessment of a $500.00 per day penalty from December until Spring.

Compare the tone of the January 4 letter to the January 24 letter which prompted this appeal. The January 24 letter states in part:

"A reinspection was made on December 31, 1979. It was found that the work has not been completed with regard to the Dawson Run, Hunter Road, Spring Run and Triangle Lease Areas, as outlined in Mr. Erb's letter of January 4, 1980 to your Mr. McMahon. Therefore, the penalties agreed to in the August 23rd Agreement must be paid."

Since a doubt as to the notification of the assessment of penalties must be resolved against the DER, we find that the Appelalnt did not receive

notice of the assessment of penalties under the Consent Order by the January 4, 1980, letter. Rather, we find that Appellant received the initial written notice of the assessment of penalties by the January 24, 1980, letter. Therefore, Appellant's appeal was timely filed and the Board has jurisdiction over the appeal.

ORDER

AND NOW, this 25th day of APRIL 1980, the Department of Environmental Resources' Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation

FOR THE COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES:

Michelle Straube, Esquire

FOR APPELLANT/RESPONDENT/DEFENDANT:

Paul H. Millin, Esquire

DATED: April 25, 1980
lla

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. 79-067-CP-B

v. :

SHARON STEEL CORPORATION

OPINION AND ORDER SUR PRELIMINARY
OBJECTIONS TO COMPLAINT FOR CIVIL PENALTY

Respondent, Sharon Steel Corporation, has filed Preliminary Objections to a Complaint for Civil Penalty filed by the Department of Environmental Resources ("DER") pursuant to Section 605 of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.* The Civil Penalty Complaint alleges that respondent unlawfully discharged industrial wastes from its steel manufacturing facility in Farrell, Mercer County, Pennsylvania. The complaint requests that we assess a civil penalty from September 1972 until the present time.

Respondent's preliminary objections are structured by its brief into eight jurisdictional issues.[1] We shall deal with them seriatim.

1. Also, preliminary objection No. 1 relating to pendant jurisdiction was withdrawn.

I *Does a stipulation dated June 13, 1972 between DER and respondent preclude the DER from instituting this action and thus deprive the Environmental Hearing Board of jurisdiction?*[2]

Respondent and DER entered into a stipulation on June 13, 1972 which required respondent to take certain actions by specified dates to eliminate water pollution at its steel-making plant in Farrell. The stipulation provided that respondent would pay a monthly civil penalty until the treatment facilities were installed and the DER, in turn, would not institute legal action against respondent during the period required for installation of the treatment facilities. Respondent argues here that the stipulation provides it with immunity from this civil penalty action notwithstanding respondent's failure to comply with the stipulation and failure to install the treatment facilities.

We disagree. The stipulation itself provides for such an eventuality. Paragraph 6 provides that in the event respondent fails to comply with the paragraphs requiring installation of treatment facilities, the DER is free to pursue any remedy available to it. Paragraph 6 of the stipulation states in pertinent part:

> "In the event that Sharon shall not have complied with any of the steps enumerated in paragraphs 1 and 2 herein, Sharon shall pay to the Commonwealth's Clean Water Fund the sum of $100.00 per day for each day of noncompliance; provided, however, for such failure the Commonwealth shall be free to pursue any remedy available to it from the date of such noncompliance."

The remainder of paragraph 6 sets forth in detail *force majeure* provisions not applicable here.

Therefore respondent's interpretation is not warranted by the language of the stipulation. Also, it is contrary to public policy as it would sanction a continual violation of The Clean Streams Law.

---

2. Although framed as a jurisdictional question, the stipulation constitutes an affirmative defense and thus would be more properly raised as an answer to the complaint.

Respondent's argument that the stipulation grants it immunity was apparently successfully presented as a defense to a summary prosecution filed for a Clean Streams Law violation before District Magistrate Tamber in Sharon, Pennsylvania. After hearing, the Magistrate, by letter to counsel dated May 15, 1979, found respondent "not guilty". The finding was based in part on the June 1972 stipulation. The Magistrate's letter read:

> "In reference of the above captioned citation numbers 14837 and 14838, after carefully re-examining the evidence and testimony, it is the decision of this court that Sharon Steel is not guilty of said violations shown on the face of citations (beyond a reasonable doubt.)
>
> "1. The court feels that under stipulation of 1972 entered into between DER and Sharon Steel that the stipulation is still in effect, therefor, it bars DER from bringing any criminal action against Sharon Steel (June 1, 1974 or until all required technology is installed, whichever is later, Note paragraph four.)
>
> "2. That testing procedures should be more adequate rather than just doing grab samples. We feel that composite testing should be done at all times and also a test of upstream water should be made to show in fact whether or not Sharon Steel is indeed polluting our waters.
>
> "3. Whenever tests are made at Sharon Steel, they should always be given samples and results of said test to inform them of possible violations to be charged.
>
> "4. The court agrees with Sharon Steel that you should use net numbers in testing for intake water parimeters.
>
> "In conclusion, it is this court's opinion that in NO WAY is the DER harassing Sharon Steel. In fact, if and when DER can prove to this court beyound a reasonable doubt that Sharon Steel is polluting our waters, maximum penalties may be the end result." (Emphasis in original)

Respondent asserts that we lack jurisdiction to assess a civil penalty because we are bound by the Magistrate's conclusion that the DER cannot file criminal charges against respondent for violation of The Clean Streams Law until respondent installs the water treatment facilities. Respondent has the ideal status in the corum of Magistrate Tamber; if it installs the treatment facilities

it will be in compliance with the law, if it doesn't install the equipment, it is immune. We decline respondent's invitation to extend its immunity to this forum. We are not bound by Magistrate Tamber's decision. Criminal actions require a higher burden of proof than civil penalties thus acquittals never preclude the filing of subsequent civil penalties for the same conduct. Also, in order for the doctrine of collateral estoppel to apply when a matter has been considered by two different tribunals, the first tribunal must have equivalent subject matter jurisdiction as the second tribunal. *City of Philadelphia v. Stradford Arms, Inc.*, 1 Pa. Commonwealth Ct. 190, 274 A.2d 277 (1971). Since Magistrates have no jurisdiction to assess a civil penalty, they cannot determine the efficacy of a civil penalty assessment and thus we are not bound by their prior pronouncements.

As part of the same jurisdictional argument, respondent contends that the doctrine of election of remedies as espoused by the Commonwealth Court in *DER v. Leechburg Mining Company*, 9 Pa. Commonwealth Court 297, 305 A.2d 764 (1973) precludes the DER from seeking a civil penalty after entering into the stipulation. Respondent states that "Having elected in 1972 to enter into a stipulation requiring Sharon to pay a monthly civil penalty, DER may not now attempt to obtain the very same relief for the very same alleged violations by means of a separate proceeding before this Board".

The *Leechburg* decision is not applicable here. In *Leechburg*, the court held that the DER could not request the Commonwealth Court in an equity action to simultaneously enforce an administrative order and require the abatement of the same violations which are the subject of the administrative order. Here the DER is merely acting in accord with an agreement between the parties; paragraph 6 of the June 1972 stipulation provides that the DER may pursue any remedy avail-

able to it in the event of noncompliance therewith by respondent.

II *Does this board lack jurisdiction over a civil penalty complaint because the civil penalties authorized by The Clean Streams Law are in fact criminal penalties and respondent is therefore entitled to a jury trial and the board lacks authority to provide a jury trial?*

Sharon Steel Corporation raised this argument by preliminary objection to a civil penalty complaint filed by the DER against Sharon under Section 9.1 of the Pennsylvania Air Pollution Control Act, the Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4009.1. *Commonwealth of Pennsylvania, Department of Environmental Resources v. Sharon Steel Corporation*, EHB Docket No. 78-071-CP (opinion and order issued June 6, 1979). At that time we held that a civil penalty is a civil not a criminal remedy. We reasoned:

> "Sharon's argument has been rejected by the board as well as the courts in the recent past. In *Comm. of Pa, DER v. Wheeling-Pittsburgh Steel Corp.*, EHB Docket No. 77-026-CP-W (Opinion and Order issued August 4, 1977) we held that a civil penalty action under Section 9.1 of the APCA is not a criminal action. In *Comm. of Pa, DER v. Harmar Coal Co.*, EHB Docket No. 73-196-B (Opinion and Order Sur Objections to Interrogatories issued February 7, 1974), we held that the DER is permitted to use pre-trial discovery in a civil penalty action as Section 605 of The Clean Strams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605 et seq., is not a criminal statute. We held in *Comm. of Pa, DER v. Froehlke*, EHB Docket No. 72-341 (issued July 31, 1973) that the standard of proof in a civil penalty action is by the preponderance of the evidence, rather than, as plaintiff argued, beyond a reasonable doubt because a civil penalty action is civil in nature, not criminal.
>
> "The Third Circuit Court of Appeals in *Frank Irey, Jr., Inc. v. Occupational Safety and Health Rev. Commission*, 519 F.2d 1200, (3rd Cir. 1975) affirmed 430 U.S. 442 (1977), held that the civil penalty provision of the Occupational Safety and Health Act of 1970, 29 U.S.C. §666 (OSHA) is civil in nature, notwithstanding the punitive aspects of the high penalties which can be assessed for willful violations. The Court opined:
>
> > '[A] deliberate and conscious refusal to abate a hazardous condition may bring about a situation where a heavy civil pen-

> alty might be needed to effect compliance with safety standards. In any event we have now come too far down the road to hold that a civil penalty may not be assessed to enforce observance of legislative policy. *See*, for example, *Oceanic Stream Navigator Co. v. Stranahan*, 214 U.S. 320 (1909), and *Hepner v. United States*, 213 U.S. 103 (1909).' Id. at 1204

"See also *American Smelting and Refining Co. v. Occupational Safety and Health Rev. Com.*, 501 F.2d 504 (8th Cir. 1974); *Beal Construction Co. v. Occupational Safety and Health Rev. Com.* 507 F.2d 1041 (8th Cir. 1974); *Atlas Roofing Co., Inc. v. Occupational Safety and Health Rev. Com.* 518 F.2d 990 (5th Cir. 1975); *Bloomfield Mechanical Contracting, Inc. v. Occupational Safety and Health Rev. Com.*, 531 F.2d 451 (10th Cir. Jan. 21, 1976).

"In *U.S. v. J. B. Williams Co., Inc.*, 498 F.2d 414 (2nd Cir. 1974) the Second Circuit Court of Appeals held that a suit by the United States to recover civil penalties for an alleged violation of a Federal Trade Commission cease and desist order did not impinge on the defendant's Sixth Amendment guarantee of a trial by jury. The Court stated:

> 'When Congress has characterized the remedy as civil and the only consequence of a judgment for the Government is a money penalty, the courts have taken Congress at its word. This seems to us the clear intendment of *Hepner v. U.S.*, 231 U.S. 103 (1909); *U.S. v. Regan*, 232 U.S. 37 (1914); and *Helvering v. Mitchell*, 303 U.S. 391, 398-405 (1938). Cf. *U.S. v. St. Regis Paper Co.*, 33 F.2d 688, 693 (2nd Cir. 1966)...In the face of a long line of contrary authority, appellants have not directed our attention to any civil penalty provision that has been held sufficiently 'criminal' in nature to invoke the protections of the Sixth Amendment.' Id. at 421.

"Thus, the precedent case law makes it clear that this board has jurisdiction to assess a civil penalty under Section 9.1 of APCA as Section 9.1 is a civil, not a criminal, remedy and that the imposition of a civil penalty does not violate the provisions of Article I, Section 9 of the Pennsylvania Constitution or the Sixth Amendment of the United States Constitution."

The holding and the rational therefore that we put forth in the air pollution civil penalty case are equally appropriate here. Section 605 of The Clean Streams Law is not a criminal remedy.

III *Is respondent entitled to jury trial under Article I Section 6 of the Pennsylvania Constitution?*

Respondent also bases its entitlement to a jury trial on Article I, Section 6 of the Pennsylvania Constitution. Article I, Section 6 guarantees the right to trial by jury in those actions where a trial by jury existed at the time of the adoption of the Pennsylvania Constitution. Respondent asserts that the remedy available to the DER under Section 605 of The Clean Strams Law was available to private citizens at the common law, thus parties involved in a Section 605 civil penalty action are entitled to have their case heard by a jury.

Respondent also proffered this argument by the preliminary objections it filed to the DER civil penalty action at *DER v. Sharon Steel Corporation*, EHB Docket No. 78-071-CP-B (Opinion and Order issued June 6, 1979). We held there that no right to a jury trial existed under Article I, Section 6. We reasoned that a civil penalty was a recent creation of statute and did not exist at common law. In our opinion disposing of Sharon Steel Corporation's preliminary objections we reasoned:

> "A civil penalty action, although possibly analogous to common law actions, is a relatively recent development in law. The Commonwealth Court in *DER v. Wheeling-Pittsburgh Steel Corporation, supra*, ruled that a defendant in an action to enforce an administrative order under Section 10 of the APCA is not entitled to a jury trial because the proceedings are 'wholly a creature of recent statutory law'. The Pennsylvania Supreme Court in *Tax Review Board of City of Philadelphia v. Warner*, 398 Pa. 381, 157 A.2d 879 (1960) held that the appellant was not entitled to a jury trial on the issue of the assessment of city water and sewer services by the Tax Review Board because:
>
> > 'Such a board was unknown to the common law and was not part of the law of the land when the Consitution of Pennsylvania was adopted. In *Commonwealth v. Bechtel*, 384

> Pa. 184, 120 A.2d 295, 298, this court said, as it has often said before: 'Constitutional guarantee of trial by jury does not prevent the legislature from creating or providing modes or tribunals other than a jury trial for the determination or adjustment of rights and liabilities which had not been triable by jury prior to the Constitution'.' Id 157 A.2d at 881.
>
> "The United States Supreme Court in *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977) held that the Seventh Amendment to the Constitution of the United States does not prevent an administrative agency, without a jury, from assessing a civil penalty for violation of the Occupational Safety and Health Act. The court's decision followed from its conclusion that Congress does not violate the Seventh Amendment when it assigns the initial adjudication of new statutory rights to an administrative agency.
>
> "Since a cause of action for assessment of a civil penalty by an administrative agency is a recent development that did not exist at the common law, no provision for a trial by jury existed at the time of the adoption of the Pennsylvania Constitution to be preserved by Article I, Section 6."

We believe that our reasoning in *DER v. Sharon Steel Corporation*, EHB Docket No. 78-071-CP was sound. Article I, Section 6 does not guarantee to respondent a right to trial by jury.

IV Does the board lack jurisdiction over the claims asserted in Counts IV through XI of the Complaint because they relate to alleged violations outside Pennsylvania?

Counts IV through XI of DER's complaint allege that discharges from outfall 003 at respondent's Farrell Works violate Pennsylvania's Clean Streams Law. Respondent questions our jurisdiction over these counts because, respondent asserts, outfall 003 is located in Ohio and discharges into Ohio waters. The DER contends, in its brief, that the past representations of respondent relating to 003 differ from the jurisdictional allegations put forth in support of its preliminary objections. The DER alleges that respondent has in the past applied

for and been issued permits for outfall 003 by the DER and its predecessor agency, the Department of Health. The DER's complaint for civil penalty alleges violations by respondent of those permits and their conditions. It also alleges that respondent agreed in the June 1972 stipulation to install treatment facilities to abate the alleged pollutional discharge from outfall 003. There is therefore a threshold factual question that must be resolved before we can sustain respondent's objection. It is well established that preliminary objections admit as true all facts which are well and clearly pleaded, and should be sustained only in cases which are clear and free from doubt. *Silver v. Korr*, 392 Pa. 26, 139 A.2d 552 (1958).

Also, the DER, in its brief, argues that even assuming arguendo that outfall 003 is located in Ohio, its discharge, nonetheless, violates the Pennsylvania Clean Streams Law, because it pollutes Pennsylvania waters. The DER references two apparently unpublished decisions by the Circuit Court of Cook County, Illinois, *People v. Inland Steel Company*, 76-CH-259 (issued October 24, 1972) and *Metropolitan Sanitary District of Greater Chicago v. Inland Steel Corporation*, 67-CH-5682 (issued September 8, 1975) which held that Illinois law could be enforced by an Illinois Court against a party whose plant was located outside of Illinois but discharged its wastes into an interstate waterway in such a manner, and to such an extend, that the waterway continued to be degraded after it flowed into Illinois. The court reasoned that Illinois possessed the power to protect its citizens and property from out-of-state polluters. We view the Illinois decisions to be based on sound reasoning but, again, the affect of any discharge from outfall 003 on Pennsylvania waters is a question of fact which must be determined by evidence adduced at hearing.

V *Are the claims alleged by the complaint to have occurred more than two years ago barred by a two-year statute of limitation?*

The DER requests that we assess a civil penalty for discharges which have occurred continually since 1972. Respondent objects; it argues that the statute of limitations prohibits the board from assessing a civil penalty for any incident which occurred more than two years prior to the filing of the complaint. Respondent cites two statutes of limitation as applicable here: (1) 12 P.S. §44; and (2) 42 Pa. C.S. §5524(5) of the Judicial Code.

12 P.S. §44 has been repealed by the Judiciary Act Repealer Act, Act of April 28, 1978, P.L. 202, No. 53, 42 Pa.C.S.A. 20002(a)[26]. Prior to its repeal it imposed a two year statute of limitations upon the Commonwealth in actions brought under a "penal act of the assembly", that is, a statute which provides for only penalties with no compensatory purpose. *DER v. Rushton Mining Company*, EHB Docket No. 72-361-CP (issued March 12, 1976). We held in *Rushton Mining* that the 12 P.S. §44 statute of limitations was not applicable to a civil penalty suit under Section 605 of The Clean Streams Law because Section 605 is not a "penal act of the assembly" in as much as it has, at least in part, a compensatory purpose.

Section 42 Pa.C.S. 5524(5) of the recent amendments to the judicial code does impose a two year limitation upon civil penalty suits. However, its effective date, which is given by the statute as June 27, 1978, was postponed for one year by the Transitional Rule of Section 25(a) of July 9, 1976, P.L. 586, No. 142. Section 25(a) states in full:

> "Any civil action or proceeding:
>
> (1) the time heretofore limited by statute for the commencement of which is reduced by any provision of this act; and
>
> (2) which is not fully barred by statute on the day prior to the effective date of this act; may be commenced within one year after the effective date, or within the period heretofore limited by statute, whichever is less,

> notwithstanding any provisions of subchapter B of Chapter 55 of Title 42 (relating to civil actions or proceedings) or any other provision of this act provide a shorter limitation."

The purpose of 25(a) is to allow a party a reasonable opportunity to file its cause of action before it is lost forever by legislative fiat. The Pennsylvania Supreme Court in *Commonwealth ex rel. Kelley v. Brown et al.*, 327 Pa. 136, 143 (1937), stated: "While a legislature may prescribe a period of limitations where none existed, or may shorten the time in which suits to enforce existing rights of action may be commenced, in either case a reasonable time must be given by the new law for the commencement of the suit before the bar takes effect."

Respondent asserts that the Transitional Rule Section 25(a) does not apply to this matter. It contends that the wording of 25(a), which states "the time heretofore limited by statute," limits the affect of the Transitional Rule to prior limitations actually imposed by statute, and since the Commonwealth was not previously subject to any prior limitation, the Transitional Rules does not apply here. We disagree; in our view the phrase quoted by respondent is not intended to limit the scope of the rule. We do not believe that the legislature intended to distinguish between two groups, those whose cause of action was previously unlimited, and those whose cause of action was limited by statute and deny a grace period to those who had no prior limitation imposed upon their ability to file suit. If the legislature had intended that the Transitional Rule should not apply in instances where a limitation had not previously existed and thus immediately forclose the Commonwealth from pursuing claims which were never previously subject to any limitation, it would have stated so explicitly. It is our view then that respondent's interpretation is not justified by either the intent or the scope of the Transition Rule.

Further, respondent's interpretation is not justified by a strict interpretation of the phrase "the time heretofore limited by statute". The common law rule that a statute of limitations does not run against the king had been fixed by statute. The common law and all of the statutes of England that were in force in Pennsylvania on May 14, 1776 were codified by the Act of January 28, 1777, 1 Sm. L. 429, 46 P.S. 152 as the law of Pennsylvania from and after February 10, 1777. Thus, the law on the applicability of statues of limitation to the Commonwealth had its genesis, in Pennsylvania, in the Act of January 28, 1777. See also the Act of December 6, 1972, P.L. _____ No. 290, 1 Pa. C.S. 1503 which also makes the common law of England the law of Pennsylvania.

We therefore find that the Transitional Rule of Section 25(a) is applicable to this civil penalty action and thus the statute of limitations set forth in 42 Pa. C.S. 5524(5) did not affect civil penalty actions until June 28, 1979, twenty-three days after this complaint was filed.

VI *Is the DER complaint defective because it failed to allege that the DER complied with Section 5 of The Clean Streams Law?*

Section 5(a) of The Clean Streams Law states:

> "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."

Respondent contends that the DER must consider the immediate and long-range economic impact upon the Commonwealth and its citizens of the assessment of a civil penalty against respondent before a complaint is filed alleging a violation of The Clean Streams Law. It appears that the respondent has the duties of the parties in this matter confused. It may be that economic impact must be considered during the promulgation of rules, issuance of permits, imposition of special conditions and discharge limitations. However once those standards are set, the respondent has a duty under the law to comply therewith; a violation of that duty imposes upon the DER a concomitant duty to enforce the law. The DER has no discretion in the face of a violation of law to decide whether the abatement of such violation is in the best interest of the Commonwealth. That has already been decided. Also, see Section 701 of The Clean Streams Law which states in part that:

> "...nothing in this act contained shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights."

We therefore find that the DER need not allege in its complaint for civil penalty that it considered the factors enumerated in Section 5 of The Clean Streams Law.

VII Does Count III of the complaint allege any facts upon which relief can be granted?

Count III of the DER's complaint merely alleges the discharge of non-contact cooling water to the Shenango River. It does not allege that such dis-

charge results in a violation of law and as such does not state a claim upon which review can be granted. DER admits the defect; it states that the defect results from the ommission of a paragraph 26 from the complaint. (DER's complaint skips from paragraph 25 to paragraph 27). Respondent's preliminary objection to Count III for failure to allege facts upon which relief can be granted is sustained.

O R D E R

AND NOW, this 5th day of June , 1980, it is hereby ordered that the preliminary objections filed by respondent, Sharon Steel Corporation, to the DER's complaint for civil penalty are dismissed except for preliminary objection 11, which objects to Count III of the complaint for reason that it fails to allege any facts upon which relief can be granted.

Preliminary objection 11 is sustained.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: June 5, 1980

cc: Bureau of Litigation
Howard J. Wein, Esquire
Robert W. Thomson, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF BLOOMING VALLEY :

: Docket No. 80-073-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO QUASH APPEAL

On March 19, 1980, appellant herein, through an authorized agent, received a letter from DER refusing to allow a discharge to Woodcock Creek in Crawford County under Chapter 95 Section 95.1 (d).

Being unsure of the appeal procedure and knowing that time was limited, appellant contacted the EHB and was advised that a mailgram could be used to initiate an appeal of the above indicated decision. On April 18, 1980, within 30 days after receipt of the letter here in question, appellant notified the Board that it was appealing the DER decision. On April 23, 1980 this Board sent an Acknowledgement of Appeal and Request for Additional Information, indicating that the standardized appeal forms, which were enclosed, and the requested information should be provided within ten (10) days. On May 5, 1980 the Board received the requested information which also indicated in the appropriate form that DER had been notified of the appeal.

Our Rules of Procedure provide at §21.52: ". . .(c) An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51[1] of this title will be docketed by the Board as a skeleton appeal. The appellant shall, upon request from the Board, file the required information or suffer dismissal of the appeal."

As we said in a recent case where the facts were similar, Johnson S. Baum v. DER Dt. No. 79-163-W, "We are satisfied that appellant has met the requirements of our Rules in filing his appeal. That it was done without counsel has not been overlooked, and we must deny the Motion to Quash."

O R D E R

AND NOW, this 16th of JUNE 1980, after due consideration of the Motion to Quash the above captioned appeal, the same is hereby denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Jeffery L. Pierce
Roberta P. Mikita

1. Rule 21.51 provides that a written appeal notice be filed and §21.52 requires that this be done within thirty (30) days after the action being appealed.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

VINCE TERRIZZI PRODUCTIONS, INC. : Docket No. 80-098-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Appellant, Vince Terrizzi Productions, Inc., petitions this board for a supersedeas from the revocations contained in a letter dated May 28, 1980 in which the Department revoked appellant's permit for the purchase of explosives, as well as its license for the storage of explosives and its certificate for manufacture.

With the exception of the standard paragraph which alerted appellant of its appeal rights, the letter of May 28, 1980 reads in its entirety as follows:

> "This is to inform you that the following permits and license are revoked and declared invalid:
>
> Permit for the Purchase of Explosives - Permit No. 2018
>
> License for Storage of Explosives - License No. 806
>
> Certificate for Manufacture - No. 1-76"

Appellant's petition for supersedeas, which was received by this board on June 10, 1980, alleged that the letter of May 28, 1980, stated no reasons for the said revocation and therefore that appellant could not properly defend itself against said revocation. Appellant's petition also alleged that the said letter would cause appellant irreparable harm and would substantially destroy appellant's business because appellant would not be able to fulfill committments made in reliance upon the revoked permit, license and certificate. No answer to this petition has yet been filed by the Department.

The board's policy to hold a hearing on a supersedeas petition within a week of filing of thereof (See 25 Pa. Code §21.76(b)) has been frustrated at least in part by the unavailability of counsel for the Department prior to the July 2, 1980. However, due to the nature of the argument raised in the appellant's petition and the fact that the letter of May 28, 1980 quite clearly fails to set forth any reason for the revocations set forth therein, the appellant's petition can and will be addressed even prior to hearing or answer.

That the requirements of due process of law apply to proceedings before administrative tribunals as well as to those before judicial bodies has long been recognized in this Commonwealth. *National Automobile Service Corporation v. Barfod*, 289 Pa. 307, 137 A. 601 (1927).

Moreover, the appellate courts of this Commonwealth have identified effective notice to the affected party by the administrative agency of the issue raised or the charges made as one of the requirements necessary to satisfy the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Federal Constitution as well as Article 1, §9 of the Pennsylvania Constitution, *Armour Transportation Company v. Pennsylvania, P.U.C.*, 138 Pa. Super. 243, 10 A.2d 86 (1940).

Of course, as discussed in *Armour, supra,* "[t]he question of what is proper notice...depends necessarily upon the facts of each case, the type of investigation being conducted, the violations alleged and the penalty or order sought to be imposed."

However, the courts require as a minimum that the notice be sufficient to enable the affected party to defend himself against the charges posed by the administrative agency *Gaudenzia, Inc. v. Zoning Board of Adjustment, et al.,* 4 Pa. Commonwealth Ct. 355, 287 A.2d 698 (1972); *Pittsburgh Press Employment Discrimination Appeal,* 4 Pa. Commonwealth Ct. 448, 287 A.2d 161, aff'd 93 S. Ct. 2553, 413 U.S. 376, 37 L. Ed. 2d 669, reh. den. 93 S. Ct. 30, 414 U.S. 881, 38 L. Ed. 2d 128; *Straw v. Pennsylvania Human Relations Commission,* 10 Pa. Commonwealth Ct. 99, 308 A.2d 619 (1973); *McClelland v. Pennsylvania State Civil Service Commission,* 14 Pa. Commonwealth Ct. 339, 322 A.2d 133 (1974); and *Tech v. Wattsburg Area School District Board of Education,* 30 Pa. Commonwealth Ct. 354, 373 A.2d 1165 (1977); see also *Derry Township Westmoreland County v. Pennsylvania Department of Environmental Resources,* 10 Pa. Commonwealth Ct. 619, 314 A.2d 868 (1973), aff'd 466 Pa. 31, 351 A.2d 606 (1976) (where the notice requirement of due process was applied to an action of the Department).

Viewed against the above stated test, the letter of May 28, 1980 is woefully inadequate. This letter does not even contain a broad allegation of unlawful conduct on the part of the appellant let alone any specific allegations. By way of comparison, in *Armour, supra,* a complaint was stricken as containing insufficient notice which complaint at least contained the allegation that the Public Utility Law had been violated. It is therefore clear that the appellant is, at least likely, to prevail upon the merits which satisfies the second of the three tests set forth at 25 Pa. Code §21.78(a) to guide this board in acting upon supersedeas requests.

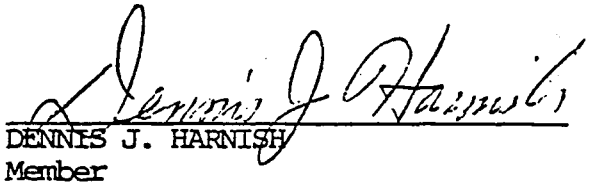
As noted above, the factual allegation of irreparable harm to appellant is also unchallenged at this juncture so that the first test set forth at 25 Pa. Code §21.78 is also met. The final test, "the likelihood of injury to the public", is difficult to assess in the present posture of this case. However, assuming arguendo, that the Department does have valid reasons for revoking appellant's permit, license and certificate, the public is not well served by proceeding with a hearing since, as per *Armour, supra,* a subsequent hearing on the record cannot cure initially defective notice. Thus, appellant could challenge an adjudication of this board upholding the Department's action regardless of the factual evidence developed at the hearing. In view of the above it would seem that it would be fairest for both parties if this board promptly granted a supersedeas. Such an action removes any unfairness to appellant and also allows the Department to cure its constitutionally deficient action at the earliest possible moment.

Since this opinion and order is being issued prior to receipt of an answer by the Department or a hearing on the petition, the Department is granted leave to an answer and request a hearing. It would seem, however, more expeditious to all concerned for the appropriate Department official to issue a letter/order consistent with the requirements of due process.

O R D E R

AND NOW, this 25th day of June, 1980, it is hereby ordered that appellant's petition for supersedeas is granted.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Peter Shelley, Esquire
Dino S. Persio, Esquire

DATED: June 25, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROBERT L. AND JESSIE M. SNYDER, et al : Docket No. 79-201-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

An opinion and order was issued by the board in this matter on April 25, 1980 wherein we stated that certain interrogatories propounded by the DER appeared irrelevant to the matters at issue. Rather than decide the issue at that time we allowed the DER ten (10) days to submit a statement explaining the relevancy of its interrogatories. We have read the DER's statement and appellants' Reply thereto and we now hold that appellants, Robert L. and Jessie M. Snyder need not answer interrogatories No. C, D, E and F propounded by the DER and apellant AH&RS Coal Company need not answer interrogatories No. A(4)-(7), B(2)-(7), D, E and F propounded by the DER.

The DER contends that the information is relevant because appellants have argued that their financial inability to reclaim the sites is a defense to this bond forfeiture action. However, it appears obvious to us that the financial inability of an operator to reclaim a surface mining site is not a defense to a

forfeiture of the bond for that site, as a purpose of the bonding provisions of the statute is to provide a means for reclamation where the operator is unable to perform the required reclamation.

O R D E R

AND NOW, this 25th day of June, 1980, it is hereby ordered that appellants Robert L. and Jessie M. Snyder need not answer interrogatories propounded by the DER No. C, D, E and F and appellant AH&RS Coal Company need not answer interrogatories propounded by the DER No. A(4)-(7), B(2)-(7), D, E and F.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

cc: Bureau of Litigation
Howard J. Wein, Esquire
Sanford M. Lampl, Esquire &
Mark L. Glosser, Esquire
Richard S. Dorfzaun, Esquire

DATED: June 25, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HAWK CONTRACTING, INC., et al. : Docket No. 80-072-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This opinion is in response to the Commonwealth's petition for discovery which was filed with this board on July 16, 1980. The said petition requested that each appellant be directed to answer the requests for admissions attached to said petition on or before August 5, 1980 since the hearing in the above-captioned matter is scheduled to begin on August 12, 1980. Separate requests were enclosed for Hawk Contracting, Inc. and Adam Eidemiller, Inc.

According to Pa. Rule of Civil Procedure 4014, the party upon whom a request for admissions is served would ordinarily have thirty (30) days after service of the request to answer or object to same.

The said rule does provide that the court may direct answers or objections to be provided sooner than thirty (30) days. However, in the instant matter the Commonwealth has proferred no reason why its requests could not have been served sufficiently in advance of the August 12, 1980 date to elict responses before that date without the necessity to shorten the thirty (30) day

period provided by the rule. Furthermore, it would appear to be prejudicial to require appellants to answer all the proffered requests within two weeks from the date on which they receive this opinion. Thus, the board does not deem that the Commonwealth's petition can or should be granted in whole.

The board has, nevertheless, reviewed the proposed requests for admissions to appellant Hawk, and has determined that the appellant Hawk could answer requests 1 through 6 on or before August 5, 1980 without prejudice since the information necessary to confirm or deny each or these requests should be readily available in this appellant's files.

A similar review of the proposed request for admissions to appellant Eidemiller, Inc. indicates that appellant Eidemiller, Inc. could answer requests 1 though 9 on or before August 5, 1980 without prejudice.

O R D E R

AND NOW, this 18th day of July, 1980, it is hereby ordered that:

1. Appellant Hawk shall respond to requests 1 through 6 of the request for admissions directed to it which is attached to DER's petition for discovery by August 5, 1980 and shall respond to the remainder of said requests in accordance with Pennsylvania Rule of Civil Procedure 4014.

2. Appellant Eidemiller, Inc. shall respond to requests 1 through 9 of the request for admissions directed to it which is attached to DER's petition for discovery by August 5, 1980 and shall respond to the remainder of said requests in accordance with Pennsylvania Rule of Civil Procedure 4014.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Michele Straube, Esquire
B. Patrick Costello, Esquire
Dom Greco, Esquire
Ralph L. S. Montana, Esquire

DATED: July 18, 1980

VP

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MILL SERVICE, INC. : Docket No. 80-078-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL
DISPOSAL COMPANY, Permittee

OPINION AND ORDER

On April 25, 1980 Mill Service, Inc. (Mill Service) commenced the appeal captioned above to contest the issuance by DER of a permit to dispose of industrial wastes to Municipal and Industrial Disposal Company (Municipal).

Municipal intervened and on June 16, 1980 filed a motion to dismiss the Mill Service appeal alleging that Mill Service lacked standing to appeal issuance of the said permit. Neither DER nor Municipal has submitted a brief on this issue, although Mill Service did cite some authority for its motion in the motion itself.

In order to be able to appeal a DER action to this board the appellant must be a "person aggrieved" by that action. Section 1917-A of the Administrative Code, 71 P.S. §510-21; *Louden Hill Farms, Inc. v. Milk Control Commission*, 420 Pa. 548, 217 A.2d 735 (1966); *Committee to Preserve Mill Creek v. Secretary*

of Health, 3 Pa. Commonwealth Ct. 200, 281 A.2d 468 (1971); *Community College of Delaware v. Fox*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975).

The Pennsylvania Supreme Court in *Louden, supra*, stated that in order to be a person aggrieved the party must have an interest in the subject matter of the particular litigation in question and that this interest must be direct, pecuniary and substantial.

These basic principles of standing were somewhat altered by the Pennsylvania Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) wherein the Court dropped the need for the interest to be pecuniary and defined "substantial" as "some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law" *William Penn, supra*, at 195, 346 A.2d at 282.

Mill Service has alleged that it has substantial, immediate and direct interest in the issuance of the permit to Municipal because Mill Service is in competition with Municipal in the western Pennsylvania geographic area for the disposal of industrial wastes. Mill Service argues that the appealed permit is defective because it does not require Municipal to fully comply with the Pennsylvania Solid Waste Act and DER's regulations promulgated thereunder. Mill Service further submits that it has been required to comply with said Act and said regulations so that Mill Service has been placed at a competitive disadvantage *vis 'a vis* Municipal by virtue of the appealed action.

For purposes of the present motion to dismiss the board agrees with Mill Service. However, since standing is a jurisdictional issue, Municipal is not precluded from arguing and briefing this issue again at a later stage in the proceedings.

The board has ruled in Mill Service's favor and has denied Municipal's motion because it agrees that a competitor has standing to insure that his competitors comply with the laws which apply to their common trade, business or profession. Clearly, a competitor has a more pecuniary and less abstract interest in an administrative agency action affecting his competitors than one whose interest is merely that other citizens should comply with the law and this interest is immediate and direct in that if one competitor can avoid the law while the other must abide by it the latter is placed at a competitive disadvantage. Thus, standing should be accorded a competitor pursuant to the tests set forth in *William Penn, supra*. Moreover, the board is persuaded by the authorities cited by Mill Service.

The federal authorities cited in Mill Service's brief, although interesting, are not necessarily compelling because Commonwealth Court has held that Pennsylvania's standing requirements are "somewhat stricter" than that supported by the federal case law, *Western Pennsylvania Conservancy v. DER and Laurel Mountain Development Corporation*, 28 Pa. Commonwealth Ct. 204, 367 A.2d 1147 (1977).

However, Commonwealth Court has itself recognized the standing of a competitor to appeal agency actions which may result in unfair competition *Matter of Elemar, Inc.*, 44 Pa. Commonwealth Ct. 515, 404 A.2d 734 (1979) wherein Commonwealth Court applied the tests set forth in *William Penn, supra*.

The authorities cited by Municipal are easily distinguishable. In *Ravotti v. Commonwealth of Pa., DER*, EHB Docket Nos. 78-131-B and 78-134-B (issued November 30, 1979) the board dismissed the appellant's appeal on the basis of lack of standing. However, *Ravotti, supra*, did not involve the issue of whether a competitor had standing but rather involved the standing of a private citizen.

Snelling v. Department of Transportation, 27 Pa. Commonwealth Ct. 276, 366 A.2d 1298 (1976) also failed to discuss whether a competitor has standing, rather this case involved an action of a municipality on behalf of its citizens.

The final case cited by Municipal, *William Penn, supra*, has been analyzed above and has been held to support Mill Service's position rather than that of Municipal.

O R D E R

AND NOW, this 23rd day of July, 1980, the intervenor's motion to dismiss is denied and the stay granted by the board order of June 20, 1980 is dissolved.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: July 23, 1980

cc: Bureau of Litigation
John E. Beard, III, Esquire &
Stephen M. Calder, Esquire
Harold Gondelman, Esquire
Stanley R. Geary, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF DOWNINGTOWN : Docket No. 80-075-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

According to its pre-hearing memorandum, the Borough of Downingtown (Downingtown), on or about September 20, 1979, entered into a written contract with Strasburg Associates to acquire and treat leachate from the Strasburg Landfill. On March 21, 1980 DER sent a short letter to Downingtown's Borough manager "not to accept leachate from the Strasburg Landfill..." until DER had completed its evaluation. This letter was appealed at the above-caption and on July 10, 1980, in lieu of a pre-hearing memorandum, DER filed a motion to dismiss or quash said appeal.

DER's motion was based upon two separate grounds. First, DER argued that the letter of March 21, 1980 was not a final determination which affects the rights of Downingtown and thus is not an "adjudication" under the Administrative Agency Law (apparently, according to DER a precondition to an appeal to this board).

Secondly, DER argues that even if the letter of March 21, 1980 did embody an appealable DER action that letter has been superseded or replaced

by a subsequent letter of May 27, 1980 thereby mooting Downingtown's appeal of the March 21, 1980 letter.

As a starting point, this board's jurisdiction is set forth in the Administrative Code of 1929, *as amended* 71 P.S. §510-21, wherein the board is empowered to "...issue adjudications under the Administrative Agency Law (citation omitted) on any order, permit, license or decision of the Department of Environmental Resources."

This board has held that the reference in the Administrative Code to the Administrative Agency Law means that "...an appeal to this board from an action of the DER, in order to be a viable one, must be from an action that, if unappealed, would constitute an adjudication under the provisions of the Administrative Agency Law (citation omitted)."

DER is therefore correct when it cites the "adjudication" definition of the Administrative Agency Law, 2 Pa. C.S. §101 *et seq.* as containing the test to be applied by this board. In other words, the first question which must be answered is whether the letter of March 21, 1980 constituted a "...final order, decree, decision, determination, ruling by [DER]...affecting personal or property rights, privileges, immunities or obligations of...[Downingtown]." 2 Pa. C.S. §101(a). *George Eremic v. DER*, EHB Docket No. 75-283-C (issued December 2, 1976).

There can be little doubt that the appealed decision did affect Downingtown's property rights as contained in its contract with Strasburg Landfill so the only remaining question and the only one articulated by DER is whether the letter was a <u>final</u> determination.

The letter of March 21, 1980 contains no notice of appeal rights or procedures such as is common in documents embodying "final" DER, decisions.

However, this omission does not per se affect the finality of the decision. In *Commonwealth v. Derry Township, Westmoreland County*, 466 Pa. 31, 351 A.2d 606, the Pennsylvania Supreme Court held that the absence of any notice of appeal rights on the face of a DER order did not keep that order from being final. Accord *Wheeling-Pittsburgh Steel Corporation v. Commonwealth, DER*, 27 Pa. Commonwealth Ct. 356, 366 A.2d 613 (1976) wherein a NPDES certification without a notice of the right to appeal was upheld as a final action.

The keystone of "finality" of DER actions as developed by Commonwealth Court and this board is whether the legal status quo of the appealing party is changed by the challenged action. Thus, in *Standard Lime & Refractories Co. v. DER*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), a letter by a DER official rejecting Standard Lime's abatement plan filed in attempted compliance with an unappealable enforcement order was considered not to be final since Standard Lime was already bound by the enforcement order before the appealed order and was not yet exposed to any additional enforcement action.

Again, in *DER v. New Enterprise Stone & Lime Co.*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976) Commonwealth Court refused to construe as a final action DER's refusal to modify a consent order because the rights and obligations of New Enterprise were not altered by DER's refusal. Accord *Eremic, supra*, which relates to DER's refusal to revoke a solid waste permit.

In the instant matter it seems clear that Downingtown's legal status quo, its rights and obligations were different after it received the March 21, 1980 letter than before, said receipt. After receiving this letter Downingtown could no longer freely carry out its part of the contract with Strasburg Landfill.

Of course, the March 21, 1980 letter was by its own terms subject to modification by DER following DER's "evaluation" but every DER order may be

modified and most require sequential compliance over time, e.g., *Standard Lime, supra*, and *New Enterprise, supra*, yet precisely these types of orders have been held to be final. Therefore, this board agrees with Downingtown that the March 21, 1980 letter of DER was a final DER decision which could be appealed to this board.

Having rejected DER's first argument, the next issue presented is whether the May 27, 1980 letter mooted the March 21, 1980 letter. Once having obtained jurisdiction, this board should not dismiss an action on the basis of mootness unless intervening events or the lapse of time render it impossible for the board to grant any relief. *Silver Spring Township v. DER*, 28 Pa. Commonwealth Ct. 301, 368 A.2d 866 (1977). In *Silver Spring, supra*, Commonwealth Court upheld this board's dismissal of the Township's appeal from a variance granted by DER to the quarry where the variance period had expired before hearing and permitted air pollution control equipment had been installed (without appeal) at the quarry.

As the Court noted in that case there was no longer any relief which the board could grant the appellants even if it agreed with their view of the facts. Here, however, if this board adopts the appellant's legal and factual positions it could grant Downingtown the right to take leachate without any further evaluations. It therefore does not appear under the *Silver Spring, supra*, test that Downingtown's appeal is moot. It should finally be noted with regard to mootness, that, contrary to DER's assertion, the letter of March 21, 1980 was not "replaced" by the May 27, 1980 letter. The second letter doesn't even mention the first, much less attempt to replace it. It does appear that the second letter sets forth some of the "evaluations" discussed in the first but in this regard the second letter at most clarifies or amends the first and does not render

it moot (See *Bethlehem Steel Corporation v. DER*, EHB Docket No. 76-003-D, Opinion and Order issued August 2, 1976).

O R D E R

AND NOW, this 25th day of July, 1980, the Commonwealth's motion to dismiss or quash appeal is denied. The Commonwealth is granted an extension of time till August 8, 1980 to file its pre-hearing memorandum.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: July 25, 1980

cc: Bureau of Litigation
Keith Welks, Esquire
William H. Mitman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES :

V. :

CONSOLIDATED RAIL CORPORATION : Docket No. 80-069-CP-W

V. :

DRAKE CHEMICAL INC. :

OPINION AND ORDER SUR
MOTION TO DISMISS THIRD
PARTY DEFENDANT

On April 10, 1980, DER filed a complaint for Assessment of Civil Penalties against the Consolidated Rail Corporation "Conrail", alleging certain violations of The Clean Streams Law. On June 6, 1980, Conrail filed a Third Party Complaint joining Drake Chemical Inc. as a Third-Party defendant, alleging that Drake was liable for any penalties assessed against Conrail in this action because of certain activities involving water run-off. On June 23, 1980, Drake filed an Answer to the Third Party Complaint denying that it discharged water run-off or industrial waste into the area which is the subject of the original complaint. On June 25, 1980, DER filed a Motion to Dismiss Third Party Defendant for lack of jurisdiction.

In *Commonwealth DER v. National Wood Preserver, et al.* 73-249 January 17, 1974 this Board denied a petition to join an additional defendant

based on a lack of jurisdiction to allow such joinder by a defendant. The reasoning in the *National Wood Preservers* case was that, only DER could initiate an enforcement action and to allow a defendant to join a third party, would be inconsistent with this rule. Here, defendant Conrail argues that Drake is actually responsible for the sequence of events upon which Conrail's liability is predicated. Under Pa. R.C.P. 2251, 2252 joinder of additional parties is allowed as a matter of right within 60 days of original service.

We believe this case is controlled by the recent decision in *Stevenson v. Commonwealth Department of Revenue and Board of Arbitration of Claims, et al.* (April 25, 1980) Pa. 413 A.2d 667. The Rules of Practice and Procedure before the Board of Arbitration of Claims have a provision similar to our Rules,[1] which makes the Pennsylvania Rules of Civil Procedure applicable to proceedings before the Board. In the *Stevenson* case the plaintiffs sought to have their claims heard as class actions on behalf of all first-prize winners in the Pennsylvania lottery. The Department moved to dismiss the class action portion of the claims on grounds that the Board was without specific authority to hear class actions. The Board granted the Department's motion and this was upheld by Commonwealth Court based on its interpretation of Pa. R.C.P. 2251 *et seq.* On appeal our Supreme Court reversed saying:

> "In *Commonwealth General State Authority v. J.C. Orr & Sons, Inc.*, 17 Pa. Cmwlth. 433, 332 A.2d 832 (1975), section 121.1 was interpreted to permit the joinder of additional defendants

---

1. Environmental Hearing Board Rules and Regulations 25 Pa. Code 21.64 provide:

(a) Except as provided otherwise in these rules of procedure, the various pleadings described in the Pennsylvania Rules of Civil Procedure shall be the pleadings permitted before this Board, and such pleadings shall have the functions defined in the Pennsylvania Rules of Civil Procedure.

as provided by Pennsylvania Rules of Civil Procedure 2251 *et seq.*[2] The joinder of additional defendants is a matter that is not limited to the conduct of hearings. In fact, it is a procedural device which, like the class action, involves making additional persons parties to the lawsuit. The Commonwealth Court did not, however, feel constrained to hold there that section 8 of the Board of Arbitration of Claims Act prevented the Board from adopting the rules relating to joinder of additional defendants, and we do not believe that the Commonwealth Court should have deviated from that line of precedent in the instant case."

It is clear that DER's motion must be denied. This new procedure will certainly allow for a more efficient handling of matters such as the one presently before us.

O R D E R

AND NOW, this 25th day of July, 1980, the Motion of DER to dismiss the Third Party Complaint joining Drake Chemical, Inc. is hereby denied.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

---

2. ". . . We also note that the Board's regulations at 4 Pa. Code § 121.1 provide that 'all proceedings in an action before the Board of Arbitration of Claims shall be, as nearly as possible, in accordance with the Pennsylvania Rules of Civil Procedure relating to the action of Assumpsit.' Inasmuch as the Pennsylvania Rules of Civil Procedure 2251 *et seq.*, 12 P.S. Appendix, involving the joinder of additional defendants apply, of course, to the action of assumpsit, we must conclude that a similar procedure must be available to a state department against which a claim is being made so that potentially liable third parties may be brought before the Board." Id. at 435, 332, A.2d at 833.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

K & J COAL COMPANY, INC. AND AQUITAINE PENN, INC. : Docket No. 80-097-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND DER'S MOTION TO STRIKE AND LIMIT APPEAL

On or about May 9, 1980 DER, by a letter attached as Exhibit A-2 to appellant's notice of appeal, denied appellant's application for mine drainage permit 17800107-Rogues Harbor. This permit would apparently have covered at least part of the area (located in Chest Township, Clearfield and Cambria Counties) which was covered by mine drainage permit No. 4270BSM2 issued January 22, 1971.

Appellant's notice of appeal, therefore, *inter alia*, included an appeal from the advice, which appellant alleged, was verbally given by DER that mine drainage permit No. 4270BSM2 had become null and void and/or was revoked so that appellant was required to file mine drainage application 17800107-Rogues Harbor.

The board, in due course, issued a pre-hearing order requiring submission of pre-hearing memoranda by the parties. Instead of submitting these

memoranda, the parties, initially, attempted to frame, by stipulation, certain legal issues and facts relating thereto which the parties desired this board to resolve prior to hearing. Apparently, the parties could not agree upon the issues and, in lieu thereof, the appellant has submitted a motion for summary judgment while DER has submitted a motion to strike and limit appeal.

Although I understand, via a phone message from DER's counsel, that each party opposes the other's motion, neither party has filed a response to the other's motion. Since each motion relies liberally upon facts *de hors* the record, the board is not in a position to grant either motion. As to the appellant's motion for summary judgment, the law is clear that summary judgment may not be granted where there is any issue as to material fact. *Borough of Monroeville v. Effie's Ups and Downs*, 12 Pa. Commonwealth Ct. 279, 315 A.2d 342 (1974); *Prince v. Pavoni*, 225 Pa. Super. 286, 302 A.2d 452 (1973); *Kotwasinski v. Ratner*, 436 Pa. 32, 258 A.2d 865 (1969). Similarly, as to DER's motion to strike a portion of appellant's appeal, an appeal should not be dismissed before hearing unless the case is clear and free from doubt *Davis v. Pennzoil Co.*, 438 Pa. 194, 264 A.2d 597 (1970).

In spite of the above citations, which preclude a final disposition of this issue, it would seem advisable for the board to discuss the respective motions in order to expedite their resolution. Essentially, appellant argues that mine drainage permit No. 4270BSM2 did not become null and void pursuant to §99.21 of DER's regulations (or Standard Condition 9 which DER alleges is contained in said permit and is to like effect) because the "mine", as used in §99.21, was placed in production prior to the expiration of two years from the permit issuance date. DER, however, counters in its motion by arguing that the validity of mine drainage permit No. 4270BSM2 cannot be considered by this board. It would seem that DER is correct that granting its motion would preclude consideration of appellant's motion and thus, analysis of DER's motion will first be addressed.

DER's motion is based upon four reasons. DER initially argues that this board has no jurisdiction to consider the status of mine drainage permit No. 4270BSM2 because DER has taken no "action" with regard to the said permit and this board's jurisdiction is restricted to reviewing actions of the department. The board agrees with DER's characterization of the board's jurisdiction and agrees that it should not render advisory opinions with regard to matters upon which DER has not yet acted. However, DER's first argument seems to confuse the need for a prior DER "action" with a prior "written" action.

Section 21.51(d) of this board's rules which is cited by DER implies that appeals may be taken from verbal actions of DER since it only requires copies of written notification of DER's action to be attached to the notice of appeal "[w]here such notices have been received."

Moreover, neither §21.2(a)(1) of this board's rules nor anything in the Administrative Agency Law restricts appealable actions to written actions. DER does not deny but, in fact, relies upon the fact that appellant had received verbal "advice" re: the disputed mine drainage permit (see paragraph 27 of DER's motion). Therefore, DER's first reason for dismissal is not well taken.

DER's second reason for striking and limiting appellant's appeal relies upon the non-adjudicatory nature of the "action" involved. Again, this board agrees that DER's citation of authority supports the proposition that this board may review only adjudicatory actions of DER.

While not stated in these words, DER apparently argues that the verbal advice given to appellant by DER employees with regard to mine drainage permit 4270BSM2 was to the effect that that permit had become null and void by operation of law, i.e., that this was merely an advisory opinion.

It is clear on the authority cited by DER, especially *Standard Lime & Refractories Co. v. DER*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), that a merely advisory opinion that doesn't affect personal or property rights is not appealable. Again, however, DER's argument fails to fully consider the type of action involved in the present matter. Unlike the cited case, the verbal action of DER applied the general legal proposition contained in §99.21 (and Standard Condition 9) to the facts of appellant's particular situation, i.e., DER implicitly must have found that there had been no production at the "mine" covered by mine drainage permit 4270BSM2 in order to determine that permit null and void. Of course, the application of a generally applicable rule of law to a particular set of facts is the very definition of an adjudication. Therefore, DER's second reason is also not well taken.

DER's third argument is based upon §21.52(a) of this board's rules which requires that the jurisdiction of this board shall not attach to an appeal from an action of DER which is filed more than thirty (30) days after the appellant receives written notice of the action or such notice has been perfected in the Pennsylvania Bulletin. Since the above section calls for a written notice, the verbal comments of DER personnel referred to in paragraph 27 of DER's motion do not trigger the thirty (30) day appeal period. However, the letter dated March 29, 1977 and attached as Exhibit "E" to DER's motion would have triggered a thirty (30) day appeal period which would have long since expired if this letter was received by the K & J Coal Company, Inc. *Rostosky v. DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 1761 (1976).

If the parties cannot stipulate as to the receipt of the March 29, 1977, letter in accordance with the order below, a hearing will be set to determine this issue. *Sharon Steel Corporation v. DER*, 28 Pa. Commonwealth Ct. 607, 369 A.2d 906 (1977).

DER's final reason for striking appellant's appeal is based upon estoppel. Without citation, DER argues that appellant is estopped from denying the need for mine drainage permit 17800107-Rogues Harbor since it had availed itself to its benefit of the statutory and administrative procedure for obtaining said permit.

The trouble with this argument is that it is difficult to comprehend what "benefit" appellant incurred by having its permit application denied. Had the permit issued appellant might well be estopped from contesting anything contained therei but that, of course, is not the present situation. It is also unclear in what manner DER changed its position in reliance upon appellant's application 17800107, another precondition to precluding appellant from now attacking the necessity of this application.

In conclusion, it appears that the first, second and fourth reasons stated in DER's motion are not well taken but that the third reason would be a proper ground for striking that portion of appellant's appeal relating to mine drainage permit No. 4270BSM2 assuming that appellant received the letter of March 29, 1977.

O R D E R

AND NOW, this 7th day of August, 1980, it is ordered that:

a) On or before August 15, 1980 counsel for both parties shall submit a stipulation with regard to receipt of the letter of March 29, 1977 or, in the alternative, shall submit their dates of availability for a hearing on this issue alone;

b) Compliance with pre-hearing order No. 1 is stayed until August 15, 1980.

ENVIRONMENTAL HEARING BOARD

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Elissa A. Parker, Esquire
William Sumner Scott, Esquire

DATED: August 7, 1980
vp

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

AGNES AND CHARLES MESSINA : Docket No. 78-142-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HUSS CONTRACTING COMPANY, Permittee

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL

This matter comes before the Board as a Motion to Dismiss the appeal filed on November 13, 1978 by appellants Charles and Agnes Messina who own a large tract of land in Carbon County, Pennsylvania.

The appeal here in question actually concerned two actions taken by DER. On May 24, 1978 DER granted an extension of Mine Drainage Permit 7374SM2 issued to Huss Contracting Company, to conduct a mining operation on appellants' property pursuant to a prior lease. On October 24, 1978 a previously issued Dams and Encroachments Permit (No. 1375702) involving the same property was extended for another year by DER. During the period in question our rules provided:

> "(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."

It is clear that appellants' have failed to file a timely appeal regarding the Mine Drainage Permit extension, but have timely filed from the Dams and Encroachments extension. Aware of this shortcoming, appellants have, in their Answer to the Motion before us, asked that the Board allow the appeal *nunc pro tunc*. We can not help but note that this "petition" is itself untimely as well as without meritorious support. *Sharon Steel Corp. v. DER*, 75-150-C, 1978 EHB 205. Although appellants base their delay on the allegation that no notice was published in the Pennsylvania Bulletin indicating that the extension was issued, in fact, they had and acknowledge, actual personal notice not later than May 31, 1978 more than five months before the appeal was filed. The suggestion that DER somehow had the responsibility to advise them of EHB legal appeal requirements, is without merit. We therefore enter the following.

O R D E R

AND NOW, this 20th day of August, 1980 the Motion to Dismiss the appeal from issuance of Mine Drainage permit No. 7374SM2 is hereby granted, and the Motion to Dismiss the appeal from issuance of Dams and Encroachments permit No. 1375702 is hereby denied.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

DATED: August 20, 1980

cc: Bureau of Litigation
K. W. Rochow, Esquire
Agnes and Charles Messina
Terry R. Bossert, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ANNVILLE TOWNSHIP SEWER AUTHORITY : Docket No. 80-064-W

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO QUASH APPEAL

On March 28, 1980, appellant Annville Township Sewer Authority filed an appeal from a letter written by DER on February 28, 1980, in which it refused to change certain waste water treatment requirements as evidenced by a 1974 water quality management permit. The permit in question had been issued based on the adoption of new water quality criteria for the Susquehanna River Basin of which notice was given to appellant on April 12, 1971. No appeal was taken from this notice, or the subsequent permit or certification limitations.[1]

DER has filed a Motion to Quash the appeal, and argues *inter alia* that the refusal letter of February 28, 1980 is not an appealable action. For reasons which follow, we agree.

---

1. Pursuant to §401 of the Clean Water Act 33 U.S.C.A. §1341, DER also certified the effluent limitations to EPA for inclusion in appellants' NPDES Permit.

The Administrative Agency Law 2 Pa. C.S. §101 *et seq.* defines an adjudication, from which appeal would lie as:

> "Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made."

This board and our courts have had many occasions to apply this definition. Recently in *Gateway Coal Co. v. DER*, 399 A.2d 802 (1979), the Court reaffirmed the fact that a letter may fall within the definition, and that form is not controlling on the question. The Court then said:

> "In order for an action to the Department to constitute a final action from which an appeal can be taken, the determination of the department must direct compliances with an Act and impose some liability or otherwise effect the obligations or duties of a person."

When we look beyond the form of the communication from which the appeal was filed, to the substance thereof, it is clear that while DER has refused a request for change in the status quo, it has not in fact altered any rights or obligations of appellant. In *Commonwealth, DER v. New Enterprise Stone and Lime Co., Inc.*, 359 A.2d 845 (1976) speaking to this very point our Commonwealth Court said:

> "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."

Mention is made by appellant of a policy change regarding the 1971 treatment requirements,[2] no doubt in an effort to bring the matter within the decision in *Bethlehem Steel Corporation v. Commonwealth, DER*, 37 Commlth. Ct. 479, 390 A.2d 1383. There is no indication however that DER has promulgated any new rule or regulation or has changed its interpretation thereof in any way. In short, ap-

---

2. The treatment requirements which were never appealed are:
BOD_5 - not to exceed 10 mg/l as an average of 5 consecutive samples or 20 mg/l at any time.
They are also contained in the water quality management permit issued to appellant on August 2, 1974 and in the certification to E.P.A. for the NPDES permit.

pellant relies on a refusal of DER to make a change in its decision and not any articulated actual change. *Eremic v. DER*, No. 1976 EHB 249. See *Kidder Twp. v. DER*, 399 A.2d 799. We find no appealable action and therefore enter the following:

O R D E R

AND NOW, this 21st day of August 1980, the Motion to Quash the appeal of Anville Township Sewer Authority is hereby granted.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Maxine Woelfling, Esquire
Timothy D. Sheffey, Esquire

DATED: August 21, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BOROUGH OF EAST STROUDSBURG :
and BOROUGH OF STROUDSBURG

:

: Docket No. 78-082-W
: 78-084-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MONROE GENERAL AUTHORITY, Intervenor

OPINION AND ORDER SUR
MOTION TO DISMISS APPEALS

Appellants, Borough of East Stroudsburg and Borough of Stroudsburg, municipalities in Monroe County Pa., filed appeals in July 1978 from an order issued by DER requiring the appellants to join a regional sanitary sewer system along with the Borough of Delaware Water Gap and others. The plan to be used as a basis for the required agreement was to be a Wastewater Facilities Plan (201) prepared on behalf of and to be operated by the Monroe County General Authority.

Appellants had previously adopted an Official Sewage Plan pursuant to Section 5 of the Sewage Facilities Act, 35 P.S. §750.5 (537 plan), which was approved by DER. Said plan provided that the County General Authority, would have responsibility for planning design, construction and operation of all new interceptors and treatment plants. Appellants after much delay and indecision, now allege that they are ready and able to proceed with the

537 plan and argue that the 201 Plan was not adopted by them, and is unsatisfactory. DER has filed a Motion to Dismiss these appeals[1] primarily based on authority of *Kidder Twp. v. DER* 399 A.2d 799 (1979) and *Carroll Twp v. DER* 409 A.2d 1378 (1980). In the cited cases the Court indicated that an appeal from an implementation order is improper and the Board has no jurisdiction where the order is based on an approved 537 plan. In such cases, the exclusive remedy is a plan revision request under 35 P.S. §750.5 (a), if the plan is no longer deemed appropriate. In the matter before us, one of the issues is based on the claim that the plan which DER has ordered implemented, is <u>different</u> from the Act 537 plan which the appellant municipalities approved. We conclude that the indicated cases are inapposite, and we enter the following:

O R D E R

AND NOW, this 27th day of August 1980, the Motion to Dismiss the appeals to No. 78-082-W and 78-084-W in the above matter, is hereby denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DATED: August 27, 1980

1. Delaware Water Gap has also appealed the order but no motion was filed to dismiss this appeal.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EUGENE SCOBEL, et al. : Docket No. 80-010-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BIG "B" MINING COMPANY, Permittee

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Petitioners, appellants in the above-captioned matter, have appealed from DER's issuance to Big "B" Mining Company of mine drainage permit 1079101 covering a parcel of land located in Washington Township, Butler County. Petitioners have also requested this board to issue a supersedeas staying the aforesaid mine drainage permit pending a hearing on the merits.

A hearing was held concerning said supersedeas petition on May 5 and 6, 1980 before Louis R. Salamon, Esquire, as hearing examiner, in the absence of a full compliment of board members. This matter has now been assigned to the undersigned board member who, having reviewed the files, the notes of testimony and the exhibits in the above-captioned matter and discussed the matter with Mr. Salamon, rules as follows:

The starting point for analysis of petitioners' request for supersedeas is Section 21.78 of this board's rules. According to this section:

"(a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:

(1) irreparable harm to the petitioner;

(2) the likelihood of the petitioner's prevailing on the merits' and

(3) the likelihood of injury to the public.

(b) A supersedeas shall not issue in cases where nuisance or significant (more than *de minimis*) pollution or hazard to health or safety either exists or is threatened during the period when the supersedeas would be in effect.

(c) In granting a supersedeas, the Board may impose such conditions as are warranted by circumstances including, where appropriate, the filing of a bond or other security."

Also relevant to this inquiry is the board's regulation governing the burden of proceeding and burden of proof, 25 Pa. Code §21.101. According to §21.101(c)(3) "...[A] party appealing an action of the Department shall have the burden of proof and burden of proceeding in the following cases unless otherwise ordered by the Board....(3) where a party who is not the applicant or holder of a license or permit from the Department protests its issuance or continuation..."

Application of the above quoted rules to the instant matter requires the petitioners, in order to receive the supersedeas they seek to shoulder the burden of proving that they will be irreparably harmed unless the permit in question is stayed; that they are likely to prevail on the merits and that the public is likely to be injured unless the stay is issued. Since the petitioners in this matter are members of the public and base their appeal upon the alleged injury to waters of the Commonwealth, in this action, harm to the petitioners is synonymous with injury to the public.

In order to show such a harm petitioners have relied upon the testimony of several expert witnesses.

Mr. Byron A. Breisch, Jr., an employee of the United States Department of Agriculture, Soil Conservation Service testified concerning soil loss from the site covered by the said mine drainage permit as well as with regard to the sedimentation and erosion controls incorporated into said permit as modified by Mr. Gary Merritt's April 17, 1980 letter. Mr. Breisch testified that the soil loss tolerance of the 10 acres covered by the said permit would be approximately 30 tons per year, i.e., that approximately 30 tons per year of soil could be expected to be developed via weathering on the said ten acres each year so that a loss of 30 tons of soil annually from that site would not harm the site *per se*. Mr. Breisch further testified that if the erosion and sedimentation controls called for in the permit (as modified) were implemented only 29 tons of soil would be lost from the site annually. No other witness has contradicted the testimony of Mr. Breisch in this regard.

It is thus seen that as far as the soil loss itself is concerned, the present evidence does not support a finding of harm since soil loss under the mining permit will be less than soil loss tolerance and only slightly greater than the present "natural" soil loss of 24 tons.

The second area of inquiry pursued through the testimony of Mr. Breisch was the impact of soil lost from the mining site on the streams which drain the mining site, in this case two unnamed tributaries of Silver Creek. In this regard, Mr. Breisch testified that approximately 7.15 tons of sediment would be delivered to the two streams annually under the said permit.

The board takes note that Mr. Breisch assumed that the proposed erosion and sedimentation facilities would perform with a 96% efficiency whereas

Mr. Dilisso testified that other erosion and sedimentation facilities at other mining sites were not so efficient. Clearly, the less efficient such facilities are in trapping eroded soil, the higher will be the resultant sedimentation in the unnamed tributaries. However, the board also notes that Mr. Breisch, as well as several DER witnesses, testified that the erosion and sedimentation facilities proposed for the instant site not only met DER's Chapter 102 regulations but exceeded these regulations and were, perhaps, the best designed erosion and sedimentation facilities in the Commonwealth. No witness has yet testified that the proposed facilities will operate at less than 96% efficiency. Thus, at least at this point, there is no evidence to support a finding that more than approximately 7.15 tons per year of soil would reach the tributaries due to mining operations. Thus, the question becomes would this amount of sediment harm the fish and acquatic communities in those tributaries.

According to the petitioners' other expert witness, Mr. Ronald Lee, a fisheries biologist employed by the Pennsylvania Fish Commission, the tributaries in question are high quality cold water fisheries. Mr. Gary Merritt of DER supported this testimony.

Mr. Lee further testified that excessive sedimentation could harm a cold water stream by causing the stream to heat up and by covering the bottom of the stream in areas presently used as fish habitats. No witness challenged this statement. However, Mr. Lee did not feel that an additional 7.15 tons of silt would cause the sedimentation problems he described. As he put it, "At 96 percent, there would probably be minimal detrimental effects." Only when the extra soil reaching the stream entered any area of 19.5 tons and/or the in-stream sedimentation increased to more than 70 parts per million over ambient did Mr. Lee forsee harm to the stream.

No witness has yet testified that mining under the permit will cause 70 parts per million of suspended solids to be exceeded in the receiving streams.

To the contrary, Mr. Merritt of DER testified that the mining permit under appeal requires that erosion from the site be controlled so that no more than 35 parts per million suspended solids as an average and 70 ppm as a maximum would result in the stream. Mr. Merritt further asserted that he believes that this criteria can be met by the proposed facilities.

In view of the above testimony this board finds that petitioners have failed to shoulder their burden of proving harm to the waters of the Commonwealth under the proposed mining permit and have, therefore, failed to qualify for a supersedeas under this board's rules. Moreover, unless and until the petitioners can prove that the proposed erosion and control of facilities will not meet the 70 ppm in-stream standard or otherwise will discharge much more than the projected 7.15 tons of soil, petitioners' likelihood of success on the merits, the other precondition for the grant of a supersedas, is not high.

The board notes, for the sake of completeness, that petitioners also raised a prime farmlands issue which, apparently, was not addressed by DER in its application review prior to the May hearings.

The federal surface mining regulations, as applied in Pennsylvania by the Department, require that the topsoil from prime farmland exposed in mining operations must be removed and replaced soil horizon by soil horizon and that care be taken in sedimentation and erosion control facilities to avoid loss of the prime farmland during mining operations. Mr. Breisch testified that up to three acres of the mining site would be properly classified as prime farmland unless this land was exempted by a negative declaration and, as of the time of hearing, DER had not sought nor had the Soils Conservation Service issued a negative declaration.

DER, apparently, has, subsequent to the hearing, submitted a negative declaration to the Soils Conservation Service which was accepted by the SCS. In effect, DER and SCS have determined the 3 acres involved was not recently being used as farmland but rather as pasture land and therefore that this area was not prime farmland as per the federal regulations. Since Mr. Breisch testified that no additional controls would be required even if the area was considered to be prime farmland, DER's negative declaration, even if erroneous, would not, in itself, support the grant of a supersedeas. Therefore, this board will not rule upon the validity of DER's negative declaration at this point in the proceedings. This issue would now seem to be ripe for consideration in the context of the hearings on the merits.

As to DER's alleged delericton of its duties as a trustee under Article 1, Section 27 of the Pennsylvania Constitution, this issue too, could perhaps benefit from further elucidation at the hearing on the merits. At present it appears that DER has complied with all statutes and regulations relative to protection of Pennsylvania's public natural resources thus has fully complied with the first of the three tests set forth in *Payne v. Kassab*, 14 Pa. Commonwealth Ct. 491, 323 A.2d 407 (1974), aff'd 468 Pa. 226, 361 A.2d 263.

Moreover, it appears that DER has taken steps to minimize the environmental harm attendant to mining by requiring Big "B" to reduce both the acreage and number of coal seams it had originally intended to mine at this site and further, by requiring such additional measures as filter fences which have only been required on a few other sites.

Finally, as to the issue of whether DER correctly balanced the social and economic benefits of mining on the proposed site against environmental harm caused thereby, there must be at least some harm demonstrated before such a balance can and need be undertaken, *Concerned Citizens for Orderly Progress v. DER*, 36

Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978) and as stated above, no harm has yet been demonstrated on this record.

O R D E R

AND NOW, this 3rd day of September, 1980, it is hereby ordered that:

1. Petitioners' petition for supersedeas is denied.

2. A hearing on the merits shall be scheduled as soon as possible but in no event later than September 30, 1980 unless requested by all parties.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: September 3, 1980

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Michael J. Boyle, Esquire
Bruno A. Muscatello, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ROBERT L. AND JESSIE M. SNYDER, et al : EHB DOCKET NOS. 79-201-B

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

* * *

FIDELITY AND DEPOSIT COMPANY OF MARYLAND 80-001-B

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

* * *

OHIO FARMERS INSURANCE COMPANY 80-041-B

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO QUASH APPEALS

This opinion and order is dispositive of petitions to quash filed in all three of the above-captioned appeals. The petitions present two legal issues: (a) does a surety have standing to bring an appeal from the forfeiture of its principal's bond because of alleged noncompliance with the Pennsylvania Surface Mining Conservation and Reclamation Act, the Act of November 30, 1971, P.L. 554, 52 P.S. §1396.1 *et seq.* (Act); and (b) does the Environmental Hearing Board have jurisdiction to hear such an appeal.

Subsection 4(c) of the Act requires a surface mining operator to file a bond for the land to be affected by his operation prior to the commencement of mining. The bond is conditioned upon the faithful performance of the requirements of the Act and The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended* 35 P.S. 691.1 *et seq.* Subsection 4(h) provides that if an operator fails to comply with the requirements of the Act or The Clean Streams Law for which liability has been charged on the bond, the Secretary shall declare such portion of the bond forfeited.

Here, the DER declared the bonds forfeited because of noncompliance with various provisions of the Act and appeals were filed by the sureties on the bonds.

The DER's initial argument—a surety lacks standing to pursue an appeal from a bond forfeiture—is based on its interpretation of Section 1396.4(h) of the Act. Section 1396.4(h) states in part:

> "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, the secretary shall declare such portion of the bond forfeited,... Any operator aggrieved by reason of forfeiting the bond..., shall have a right to contest such action and appeal therefrom as herein provided." (Emphasis supplied)

DER reads "operator" as a term of limitation and accordingly argues that subsection 1396.4(h) limits appeals from DER bond forfeitures to those filed by operators

We disagree. Section 1396.4(h) does not have as a purpose the imposition of a limitation on the categories of persons who have the right to appeal. The inclusion of "operator" is not intended to exclude others. Rather, its intent is to affirm that a forfeiture is an appealable event. Also, the DER's interpretation does not square with Section 1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.L. 510-21 which grants all

persons who are aggrieved by a DER action the opportunity to appeal. Section 1921-A states:

> "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 preson until such person has had the opportunity to appeal such action to the Environmental Hearing Board." (Emphasis added)

It may well be that DER's interpretation, which has the effect of limiting the right to a hearing to a certain category of persons, constitutes a taking without due process contrary to the fourteenth amendment of the United States Constitution. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) and *Bell v. Burson*, 402 U.S. 535 (1971). The maxim *inclusio unius est exclusio alterius* does not apply.

In sum, we find that anyone who is aggrieved or "adversely affected" by the DER action of forfeiture of bonds has, by law, the right to contest the forfeiture.

DER also argues that appellants were not aggrieved by the forfeiture of the bonds. The DER contends, their grievance is "in essence a contractual dispute between [a surety] and its principal". The DER cites *Joseph McFadden v. DER*, 3 EHB 25 (1974) and *New Enterprise Stone and Lime Company, Inc. v. DER*, 4 EHB 167 (1975) for the proposition that the Environmental Hearing Board lacks jurisdiction to review private contractual disputes.

DER's assertion is in error. Clearly appellants, as sureties, have numerous funds at stake and dependent on the propriety of the DER action. Also the law governing suretyship in Pennsylvania precludes us from treating appellants' grievance as a private dispute between surety and principal. The law provides that the liability of a principal and his surety are identical and recovery against one depends on the right to recover against the other, thus a surety may show as a bar to his responsibility under the surety contract any

defenses which the principal may have against the creditor. A surety may also undertake any action which the principal might have used to defend against a forfeiture. Stearns, Law of Suretyship, §7.1, 5th ed.; Sum. Pa. Jur. Surety and Guarantor §53; 24 Am Jur 2d 994, Suretyship §135.

We therefore find that a surety is a person adversely affected by a DER bond forfeiture as the term is used by the Administrative Agency Law, as the surety has property which is affected and because under the laws governing suretyship contracts, the surety stands in the shoes of the mine operator and may assert his defenses.

O R D E R

AND NOW, this 9th day of September, 1980, it is hereby ordered that the petitions to quash appeal filed in *Robert L. and Jessie M. Snyder v. DER*, EHB Docket No. 79-201-B, *Fidelity and Deposit Company of Maryland v. DER*, EHB Docket No. 80-001-B and *Ohio Farmers Insurance Company v. DER*, EHB Docket No. 80-041-B are denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: September 9, 1980

cc: Bureau of Litigation
Robert P. Ging, Jr., Esquire
Howard J. Wein, Esquire
Steven H. Wyckoff, Esquire
Samuel C. Holland, Esquire
Richard S. Dorfzaun, Esquire
Mark L. Glosser, Esquire &
Sanford M. Lampl, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

VINCE TERRIZZI PRODUCTIONS, INC. : Docket No. 80-098-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION TO QUASH

This matter, which is before this board on DER's motion to quash, is, to say the least, in an unusual posture. On December 1, 1976, DER issued the appellant a certificate for the manufacture, storage and handling of fireworks, No. 1-76. DER also issued appellant a license for the storage of explosives, on November 7, 1979 and a permit for the purchase of explosives on April 23, 1980. All of the above were issued on DER forms.

By letter, dated May 28, 1980, DER revoked the above permit, license and certificate and informed appellant of its right to appeal to this board. Appellant followed the advise contained in the May 28, 1980 letter and initiated the instant action.

Now DER alleges, in its motion to quash, that this whole sequence of events was based upon the erroneous exercise by DER of powers entrusted to the

Commonwealth's Department of Labor and Industry (DLI). DER argues that since it did not have the power to issue the said permit, license and certificate in the first place these documents were legal nullities so that DER's later revocation thereof did not change the legal status quo.

Not only is DER's argument concerning its powers surprising and ingenious, it may be based upon a proper legal analysis of the appropriate statutes. However, as this board has noted in numerous decisions, it is not empowered to render advisory opinions. The determination of which agency, as between DER and DLI should regulate fireworks handling and storage in Pennsylvania is outside the jurisdiction of this board (which jurisdiction is restricted to acting upon actions of DER).

Notwithstanding the above, this board is now in a position to terminate the instant matter. The board will construe DER's letter of July 22, 1980 to the appellant as an implicit cancellation of its May 28, 1980 revocations of the said permit, license and certificate. In that letter, DER submitted that it did not have authority to issue said documents, and this implies, of course, that DER did not have the authority to revoke them either. Whether or not DER's legal analysis is correct, it is clear that DER has abandoned any attempt to regulate in the fireworks area. Of course, if DER's legal analysis is correct the permit, license and certificate held by appellant would be legal nullities but, if DER's analysis is incorrect these documents would seem to retain validity.

In conclusion, it is the purpose of the following order to place the appellant precisely in the position it occupied prior to DER's May 28, 1980 revocation of the said permit, license and certificate. This board does not validate nor does it nullify the said permit, certificate and license issued to appellant it merely sets aside DER's revocation of these documents as well as appellant's appeal from said revocation.

O R D E R

AND NOW, this 11th day of September, 1980, it is hereby ordered that:

1. The DER letter of May 28, 1980 and the revocations stated therein are hereby set aside, cancelled and rendered null and void.

2. Purchase Permit 2018; Storage License 806 and Certificate for Manufacture 1-76 shall all have the same legal status they had prior to May 28, 1980.

3. The above captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: September 11, 1980

cc: Bureau of Litigation
Peter Shelley, Esquire
Dino S. Persio, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF SALISBURY :

:

Docket No. 80-115-W

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL

On June 12, 1980, in responding to a Planning Module for Land Development submitted by Salisbury Township on behalf of U.G.I. Development Corporation, DER indicated that the submission was deemed to be "a plan revision and not a plan supplement as submitted." The Sanitary Sewage Specialist responding to the Township then stated that information needed to comply with Article I section 27 of the Penna. Constitution would have to be supplied for further consideration. DER then said, "Therefore, enclosed is Component VI-General Environmental, Social and Economic Information, which must be completed and submitted with the Planning Modules for Land Development so the Department can evaluate the proposed development's impact on the Keck Site archeological resources and the proposed historic Village of Salzburg."

On July 9, 1980, the Township of Salisbury filed an appeal from the letter, alleging an abuse of discretion by DER. On July 17, 1980 U.G.I.

Development Corporation also filed an appeal from the same letter. U.G.I alleged *inter alia* that DER erred in determining that the plan is a revision rather than a supplement and in requiring that Component VI be completed and submitted along with the Planning Modules for Land Development.

On August 25, 1980, DER filed a Motion to Dismiss the Appeals for Lack of Jurisdiction. DER contends that its letter of June 12, 1980 is simply a request for additional information, and not an appealable order or decision. It is now too well established to require extended discussion, that this Board can only properly review adjudications or decisions of DER which are final actions and which affect personal or property rights of the appellant. *Gateway Coal Co. v. DER* 399 A.2d 802 (1979), *Bethelem Steel Corp. v. DER* 390 A.2d 1383.

Recently in *Annville Township Sewer Authority v. DER* No. 80-064-W we said:

> " When we look beyond the Communication from which the appeal was filed, to the substance thereof, it is clear that while DER has refused a request for change in the status quo, it has not in fact altered any rights or obligations of appellant. *Commonwealth of Pa, DER v. New Enterprise Stone & Line Co., Inc.* 399 A.2d 845 (1976)."

It is clear that appellants will have their day in Court when and if DER does finally refuse their planning request regardless of whether the decision is based on the submission being a revision or a supplement, and our review can properly follow. We therefore enter the following:

ORDER

AND NOW, this 19th day of September, 1980, the Motion to Dismiss the above appeals for Lack of Jurisdiction, filed on behalf of DER, is hereby granted.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: September 19, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHARLES J. BONZER : Docket No. 80-133-B

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Appellant, Charles J. Bonzer, has filed with this board two appeals from the same order of the Department of Environmental Resource (DER). The appeals were filed six and one-half months apart and the DER requests that we quash the second appeal because it was not filed within the statutorily provided appeal period and because it is duplicative of the earlier appeal.

Board Rule 25 Pa. Code 21.52 provides that this board lacks jurisdiction to hear appeals from DER actions that are filed more than thirty (30) days after receipt of notice of the action.

The DER issued the subject order to appellant and certain other named individuals on January 31, 1980 directing that certain actions be taken to remove an alleged encroachment in the tributary of a stream known as Streets Run. The appellant, along with the other persons named therein, filed an appeal with this board at EHB Docket No. 80-033-B on February 25, 1980.[1] A hearing on the

1. The DER later withdrew the order as to all persons named therein except Charles J. Bonzer.

appeal was set for June 23 and June 24, 1980. However the hearing was later cancelled because appellant's counsel withdrew from the case and appellant needed time to retain new counsel. A subsequent hearing date was set for October 2, 1980.

Appellant has retained new counsel who filed an appeal at this Docket No. 80-133-B on August 22, 1980 from the same order that the earlier appeal was filed and on which the hearing is scheduled for October 2, 1980. We suspect that counsel for appellant was either unaware of the proceeding at Docket No. 80-033-B or was being overly protective of appellant's appeal rights.

In any event this appeal is unnecessary as repetitive of the earlier appeal at EHB Docket No. 80-033-B; further we have no discretion but to dismiss this appeal because it was filed more than thirty (30) days after appellant received notice of the DER order. See *Rostosky v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976).

ORDER

AND NOW, this 24th day of September, 1980, it is hereby ordered that the appeal of Charles J. Bonzer at EHB Docket No. 80-133-B is dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

cc: Bureau of Litigation
Michele Straube, Esquire
George Shorall, Esquire

Thomas M Burke

BY: THOMAS M. BURKE
Member

Dennis J Harnish

DENNIS J. HARNISH
Member

DATED: September 24, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

KISKIMENTAS TOWNSHIP : Docket No. 78-043-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

The Department of Environmental Resources (DER) has filed a motion for summary judgment pursuant to EHB Rule 21.64(a) and Pa. R.C.P. 1035 requesting that we dismiss the appeals of Kiskimentas Township (Kiski) and the Kiskimentas Township Municipal Authority (Authority) taken from DER orders directing Kiski and the Authority to plan, design and construct a sewage system to serve populated areas of Kiski.

We are empowered to grant a motion for summary judgment prior to hearing when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. *Summerhill Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978); *Associates Commercial Corporation v. Commonwealth of Pennsylvania, Department of Environmental Resources*, EHB Docket No. 78-140-B (issued July 2, 1979).

The appeals of Kiski and the Authority are atypical in that they admit substantially all of the findings set forth by the DER in its order. Appellants

admit that there are many malfunctioning sewage disposal systems in Kiski which are installed in soils unsuitable for the renovation and disposal of sewage and that discharges from the malfunctioning on-lot disposal systems are causing pollution of the waters of the Commonwealth. Appellants also admit that Kiski's Official Sewage Facilities Plan, the Armstrong County Sewer and Water Plan, proposes that Kiski provide sanitary sewer service within its boundaries by 1979. Also, it is admitted by appellants that Kiski is a member of the Kiski Valley Water Pollution Control Authority whose purposes is to convey and treat sewage from the member municipalities at a recently constructed sewage treatment plant which is available for use by Kiski and that the use of that system was the most economical way to treat the sewage generated within Kiski.

Appellants do not dispute the need for a sewage system; rather, they contend in the notices of appeal that this board should vacate the order as unnecessary because they have "taken all necessary steps towards (sic) the implementation of a sanitary sewer collection and conveyance system". In support, appellants assert that they have "proceeded to take steps to secure Federal Construction Grant Funding to construct the sewage project" which steps included the submission of a step 1 application. They also allege that they have submitted to DER a feasibility report and a "201 planning area deliniation request".

In light of the admissions by Kiski and the Authority, the DER contends that it is entitled to judgment as a matter of law. The DER cites *Ramey Borough v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 466 Pa. 45, 351 A.2d 613 (1976) and *Samuel Persky, et al v. DER and Abington Township*, 1977 EHB 73 for the proposition that "[t]he existence of malfunctioning on-lot disposal systems, soils unsuitable for the installation of on-lot disposal systems and untreated or inadequately treated sewage discharges into the waters of the Commonwealth is, as a matter of law, a sufficient factual basis to sustain the issuance

of an order under §203 of The Clean Streams Law to plan, design and construct wastewater collection and conveyance facilities".

Appellants have notified the board that they will take no action to defend against the DER's motion for summary judgment. Nevertheless, we are empowered to grant a motion for summary judgment only if it is clear and free from doubt that the moving party is entitled thereto. *Berman & Sons, Inc. v. Pennsylvania Department of Transportation*, 21 Pa. Commonwealth Ct. 317, 345 A.2d 303 (1975). Also, we must accept as true all averments of fact pleaded by appellant and all reasonable inferences which are fairly deductible from the facts so pleaded, and the record must be viewed in light most favorable to the nonmoving party. *Schacten v. Albert*, 212 Pa. Super 58, 239 A.2d 841 (1968).

The issue raised by DER's motion for summary judgment and appellants' answer thereto can be phrased: "Is the DER empowered to order Kiski to plan, design and install a sewage system on a specified scheduled to abate discharges from on-lot sewage systems which are causing pollution of waters of the Commonwealth, notwithstanding the fact that Kiski is proceeding expeditiously and in good faith to plan, design and install a sewage collection system. Neither *Ramey Borough* or *Persky* is determinative of this issue. In *Persky* the appellants disputed the need for sewage facilities and in *Ramey* the appellant refused to proceed because of the cost of the system.

Section 203(b) of The Clean Streams Law grants the DER the power to issue an order when "...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..." We are of the opinion that an order is not "necessary" if a municipality is proceeding in due course to accomplish the objective which would be set forth in the order. An order is not an inconsequential act. A municipality encumbered by an order is subject to criminal sanctions for violation of that order and a municipality can be assessed civil penalties for noncompliance with an order.

Appellants' contention that they are presently, and have, in the past, been proceeding in due course to install the sewer system places at issue the length of time that the DER's order gives the appellants to perform the requirements of the order. For example, Paragraph C of the order requires appellants to submit a plan for pollution control within 180 days after receipt of grant approval from EPA. We are unable to say that the 180 day period is reasonable as a matter of law.

The DER also cites *Carroll Township v. DER, et al*, _____ Pa. Commonwealth Ct. _____, 409 A.2d 1378 (1980) as support for its motion for summary judgment. *Carroll Township* stands for the principle that a municipality cannot change or alter its responsibility to implement its official plan through the appeal of an order issued under Section 203 of The Clean Streams Law and Section 10(3) of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*.

However, the *Carroll Township* case is not pertinent to this matter as appellants do not contend that they desire to alter or change their official plan in this proceeding. Rather, it appears that some change in Kiski's Official Plan will inevitably result from the planning process as Paragraph C of the order require Kiski to submit the final plan as a revision to its Official Plan. Kiski admits that its official plan calls for construction and operation of sewage facilities by 1979. But the inference to be drawn from its notice of appeal is that completion by 1979 was beyond its control because of unavailability of federal funds (Kiski's notice of appeal contends that the DER denied its application for federal funds in 1975 because of insufficient federal funds).

In sum, we deny DER's motion for summary judgment because it appears to the board that a genuine issue of fact remains to be decided, i.e., whether Kiskimentas Township and/or its Municipal Authority is proceeding in due course to install sewage facilities to abate the existing sewage pollution.

O R D E R

AND NOW, this 10th day of October, 1980, it is hereby ordered that the motion for summary judgment filed by the DER is denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: October 10, 1980

cc: Bureau of Litigation
Maxine Woelfling, Esquire
Timothy J. Geary, Esquire
Charles F. Fox, III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

K & J COAL COMPANY, INC.
and AQUITAINE PENNSYLVANIA, INC.

Docket No. 80-097-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

SECOND OPINION AND ORDER
SUR APPELLANTS' MOTION FOR
SUMMARY JUDGMENT AND DER'S
MOTION TO STRIKE AND LIMIT APPEAL

Appellants in the above-captioned matter have attempted to invoke the jurisdiction of this board to review DER's denial of mining permit no. 56-17800107-01 as well as to review alleged verbal advice that mine drainage permit no. 4270BSM2, which was issued by DER to Kristianson and Johnson Company in 1971, (hereinafter the '71 permit) had become null and void and/or was revoked. It is not clear from their joint Notice of Appeal which appellant is appealing which purported "action" of DER. However, appellants' counsel, during a conference call, suggested that K & J Coal Co., Inc is appealing from DER's denial of its mine drainage permit application 56-17800107-01 while Aquitaine Pennsylvania, Inc., a successor by merger to Kristianson and Johnson, is appealing DER's alleged verbal advice regarding the '71 permit.

Appellants have attempted to separate the above issues by filing a Motion for Summary Judgment relating to the '71 permit while DER has challenged this board's jurisdiction to consider the '71 permit via its Motion to Strike and Limit Appeal.

On August 7, 1980, I issued a first Order and Opinion with regard to the above Motions. Part of this Order called for a hearing regarding receipt by K & J Coal Co. of a DER letter dated March 29, 1977 which declared the '71 permit to be null and void. At this time, I was under the misapprehension that Kristianson and Johnson Coal Co. and K & J Coal Co. were one and the same legal entity and it was based upon this misunderstanding that I rejected some of the other arguments set forth in DER's Motion to Strike and Limit.

Now, however, appellants' Amended Response to Motion to Strike and Limit Appeal has clarified the relationship of the relevant corporate entities and disabused me of my misunderstanding. It is now clear that K & J Coal Co., is and always has been a completely separate corporation from Kristianson and Johnson Coal Co. Inc., while Aquitaine Pennsylvania, Inc. is the successor by merger to Kristianson and Johnson Coal Co.

Other things too have changed since the board's first Opinion and Order in this matter: the parties have agreed to cancel the hearing on the issue of receipt of the March 29, 1977 letter which had been scheduled by the board; DER has filed a brief in support of its Motion and has answered appellants' Motion and the date for appellants' filing of a brief responsive to DER's brief (October 3, 1980) as set forth in my letter of August 15, 1980 has passed without receipt of such a brief.[1]

On the basis of a careful review of all documents received to date in the above-captioned matter, I have decided to grant DER's motion and to deny appellants' motion.

---

1. Appellants' counsel also represented that he intended to file no answering brief to DER, but rather, would rest on this pleadings and other submissions.

I have reached this conclusion because I agree with DER that K & J does not meet the requirements for "standing" to appeal the alleged "action" of DER concerning the '71 permit and because no "final" action has been taken with regard to Aquitaine.

More specifically, I agree with DER that K & J was not "adversely affected" within the statutory meaning of that phrase because K & J does not have a legally cognizable interest in the 1971 Permit. That having a legally cognizable interest is a precondition to having standing is demonstrated by the cases cited at pages 13 and 14 of DER's brief as well as the recent Commonwealth Court decision in *Strasburg Associates v. Newlin Twp.*, ___*Pa. Commonwealth Ct.*___, 415 A.2d 1014 (1980).

As discussed above, the appellants have emphasized in their pleadings that K & J "is now and always has been a separate corporation from Kristianson and Johnson Coal Co. and Aquitaine Pennsylvania, Inc." Thus, it is clear that K & J would have no legally cognizable interest in the 1971 permit absent a showing that the '71 permit had been transferred to K & J. The present record, if anything, shows that there has been no such transfer; the only discussion of a transfer of said permit from Kristianson and Johnson to K & J is DER's letter of March 29, 1977 refusing to allow such a transfer.[2]

Moreover, as per the representation of the appellants' counsel, Aquitaine rather than K & J, appealed from the '71 permit "action" of DER thus, K & J's standing would be irrelevant to the legal sufficiency of Aquitaine's appeal.

---

2. If K & J received this letter (and that issue is not reached in this Opinion) that company would have had standing to appeal that action of the Department and, in fact, would have been required to take an appeal from such action within the statutory period.

Unlike K & J, it would seem that Aquitaine, as successor by merger to Kristianson and Johnson, would have a legally cognizable interest in the '71 permit.[3] According to Pennsylvania law, in a merger the surviving corporation succeeds to all the rights which were possessed by other constituent corporations. [See 15 P.S.3 §803 and 1907 and §480 P.L. E. Corporation.]

Thus, it would seem clear that Aquitaine succeeds to whatever rights and interests Kristianson and Johnson maintained in the '71 permit at the time of merger. However, assuming, arguendo, that the alleged verbal representations of DER to Aquitaine did occur and that verbal "actions" could, in any situation constitute "final" DER action,[4] it is clear that, in this case, DER has taken no "final action" with regard to the '71 permit as against Aquitaine.[5]

In fact, both parties have explictly or tacitly agreed that there has been no final action with regard to Aquitaine. DER suggests, in footnote 9 (2) of its brief, that Kristianson and Johnson (or more properly its legal successor Aquitaine) could raise the issue of the '71 permit by filing an application for mining permit in the area covered by the '71 permit which means that it is DER's position that no final action has been taken by DER concerning the '71 permit *vis a vis* Aquitaine. For its part, Aquitaine, has agreed to avail itself of DER's suggestion by filing a mining permit application, as acknowledged in the letter of its counsel dated September 16, 1980.

Should DER reject Aquitaine's mining permit application and should Aquitaine appeal that rejection to this board issues concerning the '71 permit

---

3. This Opinion does not reach the issue of whether §99.23 requires a transfer of the '71 permit to Aquitaine.

4. DER vigorously denies that verbal actions can ever be final actions. The board need not reach this issue in this opinion and does not reach it. Any comments included in the first opinion in this matter on this issue were purely advisory.

5. The board adopts the cases cited on pages 5 and 6 of DER's brief as well as, 71 P.S. §510-21(c) itself, for the proposition that appeals lie to this board only from final actions of DER.

would then be ripe for consideration. At this stage, however, Aquitaine's appeal concerning the '71 permit and the appellants' motion for summary judgment based thereupon are premature.

O R D E R

AND NOW, this 10th day of October 1980, it is ordered that:

a) that portion of the above-captioned appeal concerning the 1971 permit is striken and dismissed;

b) DER's Motion to Strike and Limit appeal is granted;

c) Appellants' Motion for Summary Judgment is denied;

d) The hearing scheduled for October 21, 1980 on appellants' motion for summary judgment is cancelled;

e) Compliance with pre-hearing order No. 1 is stayed pending DER's review of the mining permit application filed by Aquitaine or until one or more of the parties requests this board to reinstate the said pre-hearing order.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: October 10, 1980

Elissa A. Parker, Esquire
William Sumner Scott, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GEORGE CAMPBELL, et al and SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION and ARTHUR SCOTT	Consolidated Docket No.	76-117-B
	Docket Nos.	76-117-B 80-012-B 80-031-B 79-121-B
* * *		
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION	Docket Nos.	80-105-B 80-116-B 80-138-B

OPINION AND ORDER

On February 1, 1980, this board granted the Susquehanna County Board of Commissioners the right to intervene as a party appellant in the appeal by George Campbell, et al from the issuance by the DER of a solid waste disposal permit to Arthur Scott and Lyncott Corporation for a solid waste disposal facility in New Milford Township, Susquehanna County.

Permittee, Lyncott, now requests that we reconsider our decision to allow Susquehanna County to intervene in light of the recent Commonwealth Court decision in *Strasburg Associates v. Newlin Township*, ____ Pa. Commonwealth Ct. ____, 415 A.2d 1014 (1980). In *Strasburg* the Commonwealth Court opined that a municipality's interest in protecting groundwater or avoiding the creation of nuisances is not sufficiently substantial, direct or immediate to give it standing

to appeal a DER permit for a solid waste disposal facility within its borders.

The Court stated:

> "The Township asserts a host of claims in an effort to show that its direct, immediate and substantial interests are threatened by improper design, construction and operation of the landfill. Most are directed toward such alleged interests as the protection of the surface and groundwater resources for residential, commercial, and industrial uses avoiding the creation of nuisances, and assuring land use compliance with local land use planning... We cannot extend standing to a Township with the purported interest of protecting the health, safety and general welfare of its citizens without its having met the requisite tests. The Township has failed to show how DER actions have adversely affected its municipal functions directly, immediately or substantially." Id. at p. 7

The *Strasburg* decision does not dictate a reversal of our prior ruling as our decision on February 1, 1980 to grant Susquehanna County's petition to intervene did not depend on the County's compliance with the requirements for standing. We stated in our February 1, 1980 Opinion and Order:

> "[A] party seeking leave to intervene need not show that he would have had standing to file the original appeal. Board Rule 21.62(e) states that our rules on intervention supplement the General Rules of Administrative Procedure. Rule 31.3 provides the definition of 'interveners' and states 'admission as an intervener shall not be construed as recognition by the agency that such intervener has a direct interest in the proceeding or might be aggrieved by any order of the agency in such proceeding. Rule 35.28 provides that a petition to intervene may be filed by anyone claiming a right or interest 'of such a nature the intervention is necessary or appropriate', and such 'right or interest may be...an interest...not adequately represented by existing parties' and 'Any other interest of such nature that participation of the petitioner may be in the public interest'. See also *DER v. U.S. Steel Corp.*, EHB Docket No. 72-397 (Opinion and Order issued April 20, 1975) where we permitted intervention status 'analogous to amicus curiae' to a citizen's group even though the citizen's group could not have instituted the original civil penalty action."

Thus, as our February 1, 1980 Order granting the County's petition to intervene was not dependant on the County's fulfillment of the standing requirements necessary for an appeal, the *Strasburg* decision on municipal standing does not justify reconsideration of our February 1, 1980 Order.

The County has also filed appeals from DER letters of approval to Stabatrol Corporation and Lyncott Corporation approving the disposal of industrial wastes at the Lyncott landfill. Apparently, the DER has required Stabatrol Corporation or Lyncott to seek separate approval for each batch of industrial waste that is deposited at the site. For example, the DER issued letters of approval dated May 20 and May 21, 1980 to Lyncott approving nine different waste materials. The County appealed those approvals on June 23, 1980 at EHB Docket No. 80-105-B. In like manner, the County has filed appeals from DER letters approving the disposal of industrial wastes at the Lyncott site at EHB Docket No. 79-121-B, Docket No. 80-012-B, Docket No. 80-031-B, Docket No. 80-105-B, Docket No. 80-116-B and Docket No. 80-138-B.

By the October 1, 1980 Opinion and Order previously referred to, we denied a Lyncott motion to dismiss the County appeal from a letter of approval at Docket No. 79-121-B. The Lyncott motion alleged lack of standing by the County. We held in the February 1, 1980 order that the issuance of the permit could prospectively affect the County's governmental responsibilities to a significant degree. The *Strasburg* decision has prompted Lyncott to file a second motion to dismiss which requests that we dismiss the County appeals from DER letters granting approval at Docket Nos. 79-121-B, 80-012-B, 80-031-B, 80-105-B, 80-116-B and 80-138-B. Lyncott argues that the *Strasburg* decision declares that the interests which we found would be affected by the DER action of issuance of the permit are to speculative to support standing for the County.

We again deny the motion to dismiss. We deny the motion because a dismissal would not serve any purpose, and it might result in confusion over the

issues to be decided on the Campbell and County appeal at Docket No. 76-117-B. The propriety of the DER action allowing Stabatrol or Lyncott to dispose of the industrial wastes at the Lyncott site is relevant to the Campbell and County appeal at 76-117-B, and therefore the issues raised by the appeals of the letters of approval are relevant to the Docket No. 76-117-B appeal whether or not the appeals from the letters of approval are dismissed. In fact, we had previously consolidated some of these appeals. The Campbell and County appeals at Docket No. 76-117-B has been consolidated with the appeals at Docket Nos. 79-121-B, 80-012-B and 80-031-B by orders issued February 1, 1980 and March 30, 1980.

In sum, we believe that the County would have the opportunity to contest the propriety of the DER action approving the disposal of industrial wastes in the Campbell and County appeal at 76-117-B even if the County had not filed separate appeals from each letter of approval. Thus a dismissal of the appeals from the letters of approval would have no practical effect, except a party might be misled to believing the propriety of the letters of approval were no longer at issue.

O R D E R

AND NOW, this 14th day of October, 1980, it is hereby ordered that the motions to dismiss appeals of Susquehanna County filed by Lyncott Corporation at EHB Docket Nos. 76-117-B, 79-121-B, 80-012-B, 80-031-B, 80-115-B, 80-116-B and 80-138-B are denied.

ENVIRONMENTAL HEARING BOARD

Thomas M Burke

THOMAS M. BURKE
Member

DATED: October 14, 1980

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimaud, Esquire
Robert J. Shostak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FAIRVIEW BOROUGH : Docket No. 80-139-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and TANDEM LAND COMPANY

OPINION AND ORDER

The DER has filed a motion for partial quashing of appeal which, in reality, seeks to limit the issues raised by appellant in its appeal from a DER order.

The DER on July 30, 1980 issued an order to appellant, Fairview Borough, directing appellant to revise its official sewage facilities plan. Every municipality in Pennsylvania is required by Section 5 of the Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. 750.1 to have a plan specifying sewage services for areas within its jurisdiction. The plan may from time to time be revised; any resident or property owner in the municipality may request the DER to order the municipality to revise its official plan where the resident or property owner can show that the official plan is inadequate to meet his sewage disposal needs.

Here, the DER, acting on a request by Tandem Land Company, ordered Fairview Borough to revise its official plan to change the designation of a certain

area from municipal sewers to on-lot sewage disposal. Fairview filed an appeal from the order contesting, *inter alia*, the adequacy of the on-lot disposal facilities that Tandem Land Company plans to install.

The DER's motion for partial quashing of appeal contends that the reasons set forth in appellant's notice of appeal which relate specifically to the proposed Tandem Land Company on-lot disposal facilities are irrelevant to this appeal. We agree. The issue before this board is DER's determination that the designated area is generally suitable for on-lot disposal systems, not the adequacy of a specific Tandem Land Company system.

If this board agrees with the DER and upholds its order, then Tandem Land Company, or any land owner, will be required to submit an application for a permit for a specific system. Any applicant will at that time be required to show to the permitting agency that the system will adequately treat the sewage it receives and any person who believes himself aggrieved by the permitting agency's decision has the right to appeal therefrom and question the adequacy of the decision.

There is presently no application for an on-lot disposal permit before the DER on which it can act, in fact, the permitting agency under Section 7 of the Sewage Facilities Act, *supra*, is Erie County.

O R D E R

AND NOW, this 15th day of October, 1980, it is hereby ordered that the motion for partial quashing of appeal is granted.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS, Chairman

Thomas M Burke

THOMAS M. BURKE, Member

Dennis Jay Harnish

DENNIS J. HARNISH, Member

cc: Bureau of Litigation
Paul F. Burroughs, Esquire
William T. Jorden, Esquire
James F. Toohey, Esquire

DATED: October 15, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FRANKLIN TOWNSHIP AND COUNTY OF FAYETTE : Docket No. 80-090-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ELWIN FARMS, INC., Permittee

OPINION AND ORDER

Elwin Farms, Inc., permittee intervenor, has filed a motion to dismiss an appeal filed jointly by the Township of Franklin and the County of Fayette. The motion contends that the appellants lack standing to appeal a DER action granting Elwin Farms, Inc. a permit to operate a Solid Waste Disposal and/or processing facility in Franklin Township, Fayette County, Pennsylvania.

Elwin Farms, Inc. (Elwin) is a party to this appeal by operation of Board Rule 21.51 which provides that the holder of a contested permit is subject to the jurisdiction of the board as a party appellee.

Elwin's standing argument relies principally on the Pa. Supreme Court's decision in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) and the Commonwealth Court's recent decision in *Strasburg Associates v. Newlin Township*, ____ Pa. Commonwealth Ct. ____, 415 A.2d 1014 (1980).

The Pa. Supreme Court in *William Penn* expounded in detail on the law governing standing to contest an action of a government body. It explained the concept of standing as follows:

> "the core concept, of course, is that a person who is not adversely affected in any way by the matter he seems to challenge is not 'aggrieved' thereby and has no standing to obtain a judicial resolution of his challenge."
> Id. 346 A.2d at 275

The Court set forth the elements of standing:

> "[O]ne 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 connect between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote'."
> Id. 346 A.2d at 277

Thus, the interest asserted by a person appealing a DER action must be "direct", "substantial" and "immediate" rather than a remote consequence of the DER action. The application of these standards to a particular set of facts is often difficult. In *Strasburg* the Commonwealth Court applied the elements of standing espoused in *William Penn* to an appeal of a DER solid waste disposal permit by the municipality where the landfill was proposed to be located. The Commonwealth Court held that the municipality's interest in protecting groundwater or avoiding the creation of nuisances was not sufficiently substantial, direct or immediate. The Court stated:

> "The Township asserts a host of claims in an effort to show that is direct, immediate and substantial interests are threatened by improper design, construction and operation of the landfill. Most are directed toward such alleged interests as the protection of the surface and groundwater resources for residential, commercial, and industrial uses avoiding the creation of nuisances, and assuring land use compliance with local land use planning... We cannot extend standing to a Township with the purported interest of protecting the health, safety and general welfare of its citizens without its having met the requisite tests. The Township has failed to show how DER actions have adversely affected its municipal functions directly, immediately or substantially."

The Court's decision in *Strasburg* reversed our practice of permitting appeals by local government units from the issuance of DER permits for facilities within their boundaries.[1] In our decision on *Strasburg*, which was reversed by the Commonwealth Court, we stated:

> "We believe that municipalities should have the right to appeal to this board where they are dissatisfied with a DER action that could prospectively affect their municipal responsibilities to a significant degree, and we will not abandon the board's practice by denying a right of appeal in this case."
> *Newlin Township v. DER and Strasburg Associates*, EHB Docket No. 78-127-D (issued February 19, 1979)

It was our view that municipal responsibilities could be directly affected by the DER issuance of a solid waste permit because the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §6001, *et seq.* imposes upon a municipality the responsibility "for the collection, transportation, processing and disposal of solid waste"[2] within its borders. We opined that a municipality "could be called on as a last resort to remedy any threat to the public health, welfare or safety that might be created within its jurisdiction". Commonwealth Court found our reasoning to be in error. Instead, it found the municipality's interest, based on its ultimate responsibility for the disposal of solid waste within its boundaries, to be "speculative".

Appellants, in answer to the motion to dismiss, advance two reasons why the appeal should not be dismissed:

1. The board cannot determine whether appellants have standing without benefit of a hearing on the merits of the appeal; and

2. "[E]very citizen of this Commonwealth has standing to see that the laws and regulations are carried out in a manner in which they are intended."

Appellants are clearly wrong on both counts. As to the first point, it is axiomatic that every person who initiates a lawsuit must allege facts from

---

1. *Wayne J. Busfield, et al v. Commonwealth of Pennsylvania, Department of Environmental Resources and George Kuehnle, Permittee and the City of Philadelphia, Intervenor*, EHB Docket No. 77-128-W (issued September 26, 1980).

2. See Sections 10 and 11 of the Solid Waste Management Act, *supra*.

which standing to bring the lawsuit can be inferred. Absent allegations supporting a direct, substantial and immediate interest, the suit must be dismissed.

Appellants second argument is directly contrary to established case law. The Supreme Court in *William Penn* set forth the applicable rule:

> "In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law. [citing *Pennsylvania SPCA v. Bravo Enterprises, Inc.*, 428 Pa. 350, 361-62, 237 A.2d 342, 349 (1968); *State Bd. of Undertakers v. Joseph Sekula Funeral Homes, Inc.*, 339 Pa. 309, 14 A.2d 308 (1940); *Smith v. McCarthy*, 56 Pa. 359 (1867); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.CT. 2924, 41 L.Ed.2d 706 (1974); *Sierra Club v. Morton*, 405 U.S. 727, 92 ST. Ct. 1361, 31 L.Ed.2d 636 (1972)..."
>
> Id. 346 A.2d 269 at 280

Appellants, in their brief in opposition to Elwin's motion to dismiss, summarize the reasons to support their contention that the solid waste permit should be denied:

> "A] The submission of false and/or misleading information in the permit application which was relied on by DER; B] The failure of DER to properly investigate the facts pertinent to the application process to assure the issuance of the permit in compliance with law and regulation; C] The inappropriateness of the site upon which the landfill is to be constructed and/or operated because of its numerous constraints and limiting features; D] The failure of DER to limit temporary storage of waste; E] The experimental nature of the process to be utilized at the landfill for the processing of wastes; F] Inadequate provisions pertaining to the transportation and spillage of wastes; G] Improper and inadequate notice of the endeavor, contrary to the letter and the spirit of the Solid Waste Management Act."

None of the above allegations would support a finding under the Court's holding in the *Strasburg* case, that appellants are aggrieved. Appellants have not asserted that the DER's actions adversely affect their "municipal functions" directly, see

Strasburg v. DER, supra. Appellants have alleged potential harm to the general health, safety and welfare of their citizens. These allegations, under *Strasburg*, are insufficient. We must therefore dismiss the appeals of Franklin Township and Fayette County because of lack of standing.

O R D E R

AND NOW, this 15th day of October, 1980, it is hereby ordered that the motion to dismiss filed by Elwin Farms, Inc. is granted. The appeals of the County of Fayette and the Township of Franklin from the Solid Waste Permit No. 300728 are dismissed.

ENVIRONMENTAL HEARING BOARD

Paul E Waters

PAUL E. WATERS
Chairman

Thomas M Burke

BY: THOMAS M. BURKE
Member

Dennis Jay Harnish

DENNIS J. HARNISH
Member

DATED: October 15, 1980

cc: Bureau of Litigation
Howard J. Wein, Esquire
Robert J. Shostak, Esquire
Michael J. Macko, Esquire
Philip T. Warman, Esquire
I. Burdette Coldren, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TOWNSHIP OF HILLTOWN : Docket No. 79-025-W
: 80-035-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and HAINES & KIBBLEHOUSE, INC., Permittee

OPINION AND ORDER SUR HAINES AND KIBBLEHOUSE, INC.'S APPLICATION FOR RECONSIDERATION AND REARGUMENT

Following the issuance of an adjudication in the above-captioned matter Haines and Kibblehouse, Inc., the permittee, filed an application for reconsideration and reargument. In its application the permittee points out that the said adjudication rested in part upon this board's construction of DER's duties as trustee under the Environmental Rights Amendment to the Pennsylvania Constitution, (Art. I, §27) an issue not addressed in the parties briefs.

Moreover, the permittee alleges that this board's interpretation of Art. I, §27 as requiring DER to consider local zoning prior to issuing a permit is at variance with prior rulings of the board. Apparently, the permittee desires the opportunity to highlight this inconsistency in a brief.

The permittee also takes note of page 8 of the said adjudication wherein the board suggests procedures for DER to follow in considering local zoning,

i.e., where the board suggests the point in time when the local zoning becomes finalized so that DER must consider it. Permittee correctly suggests that the board's adjudication states at page 8 that DER need not consider a zoning ordinance which is under appeal and the permittee asks this board to accept evidence that the Hilltown zoning ordinance in question in the instant case is under appeal.

The board agrees with the permittee that the adjudication in the instant case represents a departure from prior board decisions, though not so great a departure as the permittee suggests. Our adjudication in *Summit Township Taxpayers Association v. DER*, 1975 EHB 99, cited by permittee, clearly did not speak to the duty of DER to consider zoning since zoning was not raised as an issue in that case, but in *Gondos, et al v. Commonwealth*, 1975 EHB 223 and *Agosta v. DER*, 1977 EHB 88, this board did hold that DER need not deny a permit where to do so it would require adjudication of a zoning question.

It is interesting to note that this board held in *Gondos, supra*, that DER may and in some circumstances should take note of local zoning in deciding whether a proposed activity was environmentally harmful, while in *Agosta, supra*, this board clearly implied that DER must consider final unappealed zoning but held, in that case, the zoning to be in question due to an appeal. Accord, *Wrightstown Township, et al v. DER, et al*, 1977 EHB 312. In *Delaware County Community College v. Fox, et al*, 20 Pa. Commonwealth Ct. 335, 342 A.2d 468 (1975) Commonwealth Court held that the "trustee" under the Environmental Rights Amendment with regard to zoning and planning was, collectively, the various local governments of the Commonwealth rather than DER. This board in its adjudication in *Concerned Citizens for Orderly Progress, et al v. DER, et al*, 1977 EHB 38 interpreted *Fox, supra*, for the proposition that the zoning and planning decisions

of the local municipalities were a separate process from the DER decisions so that DER should not and, indeed, could not consider local zoning or in any other manner weigh the environmental impacts of a project against its social benefits where local decisions were called for. Clearly, this board went even further in *Concerned Citizens, supra,* than in *Agosta, supra, Wrightstown, supra,* or *Gondos, supra,* in separating local zoning from the DER decision-making process.

On appeal, however, Commonwealth Court held that this board went too far. In *Concerned Citizens for Orderly Progress v. DER,* 36 Pa. Commonwealth Ct. 192, 387 A.2d 989 (1978), Commonwealth Court while upholding this board's adjudication, held that, "[w]hile it is the responsibility of local governmental agencies to deal with planning, zoning and other related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning..." 36 Pa. Commonwealth Ct. 192, 199-200.

Following Commonwealth Court's opinion in *Concerned Citizens, supra,* which post-dated the various adjudications of this board cited above it is abundantly clear that DER must consider local zoning in its permit decisions.

Thus, to the extent that any of the cited opinions or other rulings of this board authorize DER to ignore local zoning they are hereby overruled as being contrary to the law of the Commonwealth. A separate reason that the Hilltown zoning ordinance must be considered by DER is set forth in the Bucks County Court opinion in *Miller and Son Paving, Inc. v. Wrightstown Township,* 32 Bucks Co. L. Rep. 239 (1978). In that opinion Judge Rufe opined that because of Section 17 of the Surface Mining and Conservation Act, local zoning supersedes any requirements of the said Act or DER regulations cited thereunder.

This board did not cite Judge Rufe's opinion for the above proposition in its adjudication since that portion of his opinion is dicta. Nevertheless,

since Judge Rufe's opinion was affirmed, upon appeal, by Commonwealth Court, it is the law which this board is required to follow.

Since the law on this point is so clear, little or nothing could be gained by a mechanistic application of this board's rule 21.122(a) to allow additional briefing. Moreover, we hold that Rule 21.122(a) does not apply because the parties did have an opportunity to brief the Art. I, §27 issue which was raised in the Township's brief. Therefore we shall turn to whether the facts alleged by the permittee merit a reopening of the record.

As to the permittee's request to show this board that the Hilltown Ordinance in question is under appeal, we feel that this ground must also be denied since it is irrelevant whether that ordinance is under appeal. The board's comments at page 8 of the said adjudication were based under an attempt to reconcile the instant matter with the board's decision in *Agosta, supra*. Since, *Agosta, supra*, has been overruled in relevant part, as described above, it is no longer necessary to attempt to effect a reconciliation between the instant matter and *Agosta, supra*. Moreover, it would seem that under the Municipalities Planning Code, *as amended*, 1978, September 28, P. L. 785, 53 P.S. §11008(4), the mere filing of an appeal with a county common pleas court from *inter alia*, a denial of a curative amendment does not act as a stay of the underlying ordinance. Thus, even if the Hilltown Ordinance is under appeal DER must take the ordinance at face value unless the reviewing court either invalidates or modifies the ordinance or enters a stay of its effect.

O R D E R

AND NOW, this 24th day of October, 1980, it is hereby ordered that:

1. The permittee's application for reconsideration and reargument is denied.

2. The adjudication of this board issued on September 30, 1980 in the above-captioned matter is modified by this opinion.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: October 24, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MILL SERVICE, INC. : Docket No. 80-078-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WILLIAM FIORE, d/b/a MUNICIPAL AND INDUSTRIAL
DISPOSAL COMPANY

OPINION AND ORDER SUR APPELLANT'S REQUEST
TO DER FOR PRODUCTION OF
DOCUMENTS AND DER'S MOTION FOR PROTECTIVE ORDER

On March 24, 1980 DER issued a solid waste disposal permit to William Fiore, d/b/a Municipal and Industrial Disposal Company. On or about April 25, 1980 Fiore's business competitor, Mill Service, appealed to this board the issuance of said permit.

On June 16, 1980 Fiore filed a motion to dismiss Mill Service's appeal and to stay the requirement to file a pre-hearing memorandum pending disposition of the said motion. On June 20, 1980 this board issued an order staying all proceedings and on July 23, 1980 this board issued a second order denying Fiore's motion to dismiss and dissolving the stay.

On or about September 19, 1980 Fiore filed a request for production of documents with the board and served same upon DER. DER has filed a motion for

protective order asking this board to prohibit the requested discovery. Fiore has answered DER's motion and has filed its motion for sanctions based upon DER's failure to honor Fiore's request for production.

DER's motion for protective order is based upon the allegedly unreasonably burdensome nature of the requested discovery.

DER also directs this board's attention to 25 Pa. Code §21.111(a) and argues that the Fiore's request, being filed more than 60 days after the appeal and not being supported by a petition to this board is not in compliance with the aforesaid rule. Fiore, in response to this argument points to the stay of proceedings issued by this board.

Technically, it appears that Fiore's argument is not well taken since almost 60 days had elapsed before this board entered a stay of June 20, 1980 and, of course, many more days have elapsed following July 23, 1980 when the stay was dissolved.

Nevertheless, all that §21.111(a) requires is an opportunity for this board to pass on late filed discovery and this opinion and order is that opportunity.

As to DER's arguments concerning the burdensomeness of Fiore's request, we feel that this matter is on all fours with *Sharon Steel Corporation v. DER*, 1978 EHB 333. In that case DER objected to the burdensomness of a request to produce all industrial waste permits and applications issued by DER (under The Clean Streams Law) since January 1, 1975. DER pointed out that many of said permits and application were located in regional offices in Harrisburg, Meadville, Norristown, Reading, Wilkes-Barre and Williamsport as well as in its Pittsburgh office.

Here DER objects to requests for documents relating to hazardous waste disposal sites issued by DER's Pittsburgh and other offices since 1970.

As this board held in *Sharon Steel, supra,* so we find here:

"We are unable to determine, based on the DER's assertion, whether or not production of these permits and applications would be unreasonably burdensome and oppressive in violation of Pa. R.C.P. 4011.

The number of permits and applications involved, the man hours and cost involved in locating the documents, the existence of an indexing system are all unknown at this time. The party asserting that discovery is unreasonably burdensom in violation of Pa. R.C.P. 4011 has the burden of proving same. 5 ANDERSON PENNSYLVANIA CIVIL PRACTICE §4011.73. However we do find that these permits and applications should remain in the regional office where they are located. Permits required by The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §691.1 *et seq.* and the applications submitted therefor are vital to the Bureau of Water Quality Management's regulatory program. To say they are the Bureau's raison d'etre would not be an exaggeration. Thus any loss or damage to them would have a significantly detrimental effect on the DER's operation. In order to minimize the potential for loss or damage to the permits and applications and to minimize the disruption of the day-to-day regulatory activities of the DER, we find that requested permits and applications should be produced for inspection and copying at the regional office where they are kept in the normal course of business. See also *Allegheny Valley Residents Against Pollution v. Commonwealth of Pennsylvania, Department of Environmental Resources, et al,* EHB Docket No. 74-232-C (opinion and order issued June 9, 1977) wherein we stated that 'Pa.R.C.P. 4009 permits only the inspection, examination and copying of documents. It does not authorize the transmittal of evidence to anyone or any place for examination.' We therefore order the DER to produce for inspection and copying the documents requested by category 1 of the appellant's petition for discovery, unless the DER on or before the date on which it is required to produce the documents, shows that the production for inspection and copying of all industrial waste permits and the applications therefor issued since January 1, 1975, for the treatment of metal finishings wastes at the regional office where they are located is unreasonably burdensome or oppressive in violation of Pa. R.C.P. 4011." 1978 EHB 333, 335

O R D E R

AND NOW, this 31st day of October , 1980, it is hereby ordered that the DER shall at a time convenient to both parties on or before thirty (30) days from the date of this order, make available for inspection and copying, the documents requested in Fiore's request for production at the various offices of the Department where they are located.

The DER shall make copying facilities available and may impose upon appellant a reasonable charge for use of its duplicating equipment.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Stanley Geary, Esquire
John E. Beard, III, Esquire
Harold Gondelman, Esquire

DATED: October 31, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FERGUSON TOWNSHIP : Docket No. 80-109-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

Ferguson Township, Centre County, has appealed from DER's refusal to reimburse the Township for expenses incurred in settlement of *Harms v. Metzger, Rossi and the Township of Ferguson*, No. 77-2905 Centre County Court of Common Pleas. The *Harms* matter arose from the issuance, on or about May 31, 1975, of an on-lot sewage disposal permit to Defendant Metzger by Defendant Rossi who was the Sewage Enforcement Officer for the township.

Metzger, on or about September 2, 1976, sold the lot covered by the said on-lot permit to the Harms who then occupied the new dwelling house located upon said lot and used the on-lot system covered by the permit.

In the above-referenced matter the Harms alleged that the Defendant Rossi and the Township were liable to them for damages resulting from defects in the said on-lot system.

The above-referenced litigation was resolved by way of a settlement in the amount of $3,997.10 between Rossi and the Harms, and Rossi billed the Township in this amount plus his legal fees of $1,375.00. Apparently, the Township has not yet reimbursed Rossi in the amount of $5,372.10 (the sum of the above figures), but it is clear that the Township submitted this amount as well as some $18.00 in its own legal fees arising from the above-referenced matter to DER for reimbursement pursuant to Section 6(b) of the Pennsylvania Sewage Facilities Act, 35 P.S. §750.1 *et seq.*, 35 P.S. §750.6(b). (Act 537)

The Township has appealed to this board from DER's refusal to grant reimbursement for the above expenses and DER has filed a Motion to Dismiss the said appeal on the basis that reimbursement of the above expenses is not provided for by Act 537 or DER's rules and regulations promulgated thereunder. The Township has answered DER's motion and both parties have filed briefs.

As to the Rossi bill, this board will grant DER's Motion to Dismiss because DER has no authority to grant the reimbursement requested by the Township. It is axiomatic that DER, as an administrative agency, is a creature of its enabling legislation, i.e., DER can lawfully exercise only those powers expressly delegated to it. *Gabriel Elias v. EHB*, 10 Pa. Commonwealth Ct, 489, 312 A.2d 486 (1975). Pursuant to Section 6(b) of Act 537, DER is authorized to reimburse local agencies "...one-half of the cost of the expenses incurred by the local agency in enforcement of the provisions of this act..." 35 P.S. §750.6(b).

In the first place Section 6(b) clearly requires that expenses must be <u>incurred</u> by a municipality before it can qualify for a reimbursement. Here the Township has not alleged that it has reimbursed Mr. Rossi any of the $5,372.10 he submitted to the Township as a bill. True, the Township cites authority for the proposition that to incur expenses means to be liable for or subject to rather than merely to have paid said expenses. However, the Township

has cited no facts or authority for the proposition that it is liable to Mr. Rossi for any reimbursement. In fact, the Township argues at page 2 of its brief that neither the Township nor Mr. Rossi was ever careless or negligent regarding the above-referenced Harms' on-lot system. Thus, any agreement on behalf of the Township to reimburse Mr. Rossi for his settlement with the Harms would seem to be a voluntary payment rather than the incurrence of an expense in enforcement of Act 537.

In the second place, Section 6(b) of Act 537, on its face, restricts DER to making reimbursements to local agencies.

As the township notes, the Statutory Construction Act of 1972, 1 Pa. C.S.A. §1903 requires that words in statutes be given their common and approved useage unless otherwise defined in the Act. The word "reimbursed" used in §6(b) of Act 537 is not defined in the Act. The common and approved useage of this word is to pay back money spent. Thus, under Section 6(b) of Act 537 DER may only pay back money spent by a municipality in enforcement of Act 537.

Unless and until the township pays Mr. Rossi's bill DER has no authority to reimburse any portion of this bill even assuming that the settlement of lawsuits against the Township constitutes enforcement of Act 537.

It should be noted that this board has not reached, in this decision, the issue of whether Mr. Rossi's settlement costs constitute enforcement of Act 537. Should the Township supplement its notice of appeal by alleging a payment to Mr. Rossi the legal issue of whether such a payment constitutes enforcement would then be ripe for oral argument before the board *en banc*.

O R D E R

AND NOW, this 31st day of October, 1980, after due consideration of the motion to dismiss the appeal of Ferguson Township to EHB Docket No. 80-109-H it is hereby ordered that:

Ferguson Township shall have twenty (20) days from the date of this order to supplement its notice of appeal to allege liability and to indicate any monies which the Township paid to Mr. Rossi for which it now seeks reimbursement arising from the said Harms matter. If Ferguson Township supplements its notice of appeal as directed above, the board shall schedule argument before the board *en banc* on the outstanding legal issues. If Ferguson Township fails to supplement its notice of appeal as directed above, DER's motion to dismiss shall be granted upon written request of DER.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis J. Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Peter Shelley, Esquire
Ronald M. Lucas, Esquire

DATED: October 31, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MIDDLE PAXTON TOWNSHIP :

:

Docket No. 80-127-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On September 3, 1980, Pennsylvania Environmental Management Services, Inc. filed a Motion to Dismiss the appeal of Middle Paxton Township for lack of standing, based on the recent decision of our Commonwealth Court in *Strasburg Associates v. Newlin Township* 415 A.2d 1014 (1980). By answer and brief filed, the appellant township argues that there are local ordinances presently in effect which distinguish this case from *Strasburg* supra. We believe that while any such Ordinances may offer other avenues to enforce local planning and other restrictions, this does not confer standing under the Solid Waste Management Act, nor avoid the Strasburg decision which we consider this Board bound to follow.

On the other hand, there are several circumstances which may distinguish Middle Paxton Township's position in the present matter from that of Newlin Township in *Strasburg*, supra. First of all, Newlin Township was the only appellant in *Strasburg*, supra. Thus, in finding that Newlin Township did not have standing, Commonwealth Court effectively ended that controversy. Here, there is another appellant and therefore even if the PEMS motion to dismiss were granted, Middle Paxton Township might qualify as an intervenor since a party seeking leave to intervene need not show that he would have had standing to file the original appeal but only that his (its) interests would not be adequately represented by another party. *George Campbell, et al v. DER, et al* EHB Docket No. 76-117-B (February 1, 1980) *DER v. U.S. Steel Co.* 1975 EHB 449.

Secondly, subsequest to *Strasburg*, supra. The Pennsylvania Solid Waste Management Act was amended (See Act 241 as amended July 7, 1980). This Act which is now effective, may have altered the standing of municipalities under Act 241. For example, section 504 of this Act appear involve host municipalities and counties to some extent in DER's permit review process.

While the board has not concluded that the amendments to Act 241 do alter the decision in *Strasburg* or that these amendments apply to the present matter, the most prudent course would be appear to defer action on the PEMS motion to dismiss until after hearing at which point the parties may brief the above issues along with other issues which arise during the hearing.

AND NOW, this 3rd day of November, 1980, after due consideration of the Motion to Dismiss the appeal of Middle Paxton Township, action upon the same is hereby defered pending hearing and post-hearing briefs in the above matter.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

DATED: November 3, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

AMERICAN RESERVE INSURANCE COMPANY : Docket No. 79-026-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
DER'S MOTION TO DISMISS

Sometime in 1964 DER's predecessor issued a Strip Mining Permit 81-3 to Northwest Mining Company, Inc. covering Pit No. 6 located on 10 acres of land at Gravity Slope No. 5 in Archbald Township, Lackawanna County. The said permit was supported by a Reclamation Bond 6PC6836 in the amount of $5,000.00 issued by Resolute Insurance Company as principal which bond is dated April 8, 1964.

Apparently, Resolute and DER's predecessor entered an agreement on December 24, 1970 with regard to certain reclamation bonds forfeited prior to that date. American Reserve Insurance Company, successor to Resolute Insurance Company and appellant in the instant matter, has alleged that DER officials represented that the said agreement covered all bonds that were in default as of that date.

On June 15, 1977 DER officials sent a Notice of Violation letter to Northwest Mining Company, Inc. with a copy to Resolute Insurance Company listing

a number of bonds in jeopardy due to alleged violations of the Surface Mining Conservation and Reclamation Act. This list included Bond No. GPC6836 but this bond was listed against Permit No. 81-12 rather than Permit No. 81-3 which latter permit was not listed in the Notice of Violation.

On November 30, 1978, DER followed-up the said Notice of Violation with a letter declaring a number of bonds forfeited. This letter also named Bond No. GPC6836 but also listed this bond against Permit 81-12. Again this letter failed to mention permit 81-3 and DER has submitted no document demonstrating a transfer of bond GPC6836 from Permit 81-3 to Permit 81-12 or any citation as to DER's authority to effect such a transfer.

DER filed a motion to dismiss the appellant's appeal for failure to appeal from the said letter of November 30, 1978 within thirty (30) days from the appellant's receipt thereof. The appellant, in response, acknowledged receipt of the said letter but, by affidavit, submits that it did not perceive that the said letter constituted notice of default of bond GPC6836 since a) this bond attached to Permit 81-3 rather than Permit 81-12 and b) the aforesaid alleged agreement of December 24, 1970 was supposed to cover all bonds like GPC6836 which were issued prior to December 24, 1970.

Appellant, further submits that it did take a timely appeal from DER's letter of February 15, 1979 wherein DER clearly stated that Bond GPC 6836 applied to Permit 81-12.

Clearly, DER's motion to dismiss must be granted if its letter of November 30, 1978 constitutes effective notice but, conversely, its motion must be denied if that notice is defective. Both 71 P.S. §510-21 and the due process clauses of the United States and Pennsylvania Constitutions require such notice as would alert the mythical "reasonable man" in order to start the 30 day appeal period. *Commonwealth v. Derry Township*, 466 Pa. 31, 351 A.2d 606 (1976).

While we feel that the appellant would have been prudent to inquire of DER concerning the status of Bond GPC6836 following receipt of DER's November 30, 1978 letter, we are reluctant to cut off the appellant's appeal rights on this basis since appellant has alleged a reasonable basis for believing that the Bond GPC6836 was listed by mistake.

O R D E R

AND NOW, this 6th day of November, 1980, it is hereby ordered that:

a) the Commonwealth's motion to dismiss is denied;

b) the order of April 17, 1979 staying DER's obligation to file its pre-hearing memorandum is dissolved and DER is directed to file its pre-hearing memorandum within twenty (20) days from receipt hereof.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: November 6, 1980

cc: Bureau of Litigation
Peter Shelley, Esquire
John L. Reizian, Legal Assistant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DORAVILLE ENTERPRISES : Docket No. 79-002-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION FOR SUMMARY JUDGMENT

On or about April 3, 1973, the appellant, Doraville, submitted to DER an application for a mine drainage permit, No. 40 73SM-3, covering a strip mining tract in Upper Turkeyfoot Township, Somerset County. The proposed mining site is in the Laurel Hill Creek Watershed which was then described as a conservation area in DER's Water Quality regulations. On or about November 28, 1973, DER denied the said application solely on the basis that the proposed mining site would be located within a conservation area.

Doraville appealed to this board from DER's denial which appeal was docketed at EHB 73-433-C. Following evidentiary hearings and briefing, on October 21, 1975, this board remanded the said application to DER with instructions to DER to review the said application to determine whether the discharge for the proposed mine would cause a violation of DER's water quality standards.

On or about December 22, 1975, DER again denied the said application and Doraville again appealed this denial which was docketed at EHB 76-011-B. Evidentiary hearings were also held in this appeal but before an adjudication was issued the parties requested and this board granted a continuance, pending the completion of a study by Frank T. Caruccio, Ph.D. concerning the acid producing potential of the proposed mining site.

Dr. Caruccio's report was completed on or about September 16, 1977 and Doraville apparently believed that DER would issue the said permit on the basis of this report. However, on December 8, 1978, DER issued a new and more complete denial which purportedly superseded and withdrew DER's December 22, 1975 denial. Doraville appealed this third denial at the present Docket No. EHB 79-002-H. By interlocutory order the appeals at 76-011-B and 79-002-H were consolidated under the latter number.

On August 10, 1979 Doraville filed its pre-hearing memorandum in the instant matter. DER has not yet filed its pre-hearing memorandum but has instead filed the Motion for Summary Judgment which gives rise to the instant Opinion and Order.

DER's motion refers to and incorporates portions of the notes of testimony in the above-referenced matters as well as Answers to Interrogatories of both parties filed in the instant matter. Doraville has answered DER's motion and the parties have briefed their respective positions.

Although not restricted to one argument, DER's motion stresses the argument that Doraville's mine drainage application is deficient as a matter of law because it does not comport with various provisions of Chapters 93 and 95 of DER's regulations as amended effective October 8, 1979. While Doraville does not deny that its application,which was filed in 1973,fails to comport with the 1979 regulations it argues that these regulations do not apply to its application.

Before addressing this legal issue it is desirable first to address two preliminary arguments raised by Doraville. First, Doraville argues that this board may not grant summary judgment sought by DER because summary judgment is not authorized by our rules of procedure. The easy answer to this assertion is that this board has been granting motions for summary judgment for years. *Summerhill Borough v. DER*, 1977 EHB 18; *Pa. Council of Trout Unlimited v. DER*, 1976 EHB 340. Moreover, the *Summerhill Borough* Opinion was upheld on appeal by Commonwealth Court *Summerhill Borough v. DER*, 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978). It must be admitted that in *Summerhill Borough, supra*, Commonwealth Court's approval of the board's use of summary judgment was merely implicit since the issue of the board's authority to issue summary judgments was not raised therein However, Commonwealth Court has discussed and approved this board's granting of motions to dismiss prior a hearing and the motion to dismiss is also not expressly provided for in the board's rules. *Silver Spring Township v. DER*, 28 Pa. Commonwealth Ct. 302, 368 A.2d 866 (1977).

In addition, this board is authorized to act upon motions for summary judgment by the Pennsylvania Rules of Civil Procedure and the general rules applicable to Pennsylvania administrative agencies. Doraville notes that 25 Pa. Code §21.64, of this board's rules, incorporates, by reference, the Pennsylvania Rules of Civil Procedure, which Rules (at Pa. R.C.P. 1035) specifically provide for summary judgment. Doraville argues that because a motion for summary judgment is not a "pleading", §21.64 does not apply. However, in a recent case Commonwealth Court held that a motion for joinder of additional defendants (also not a "pleading") was permitted before the Board of Claims which has a rule quite similar to 25 Pa. Code §21.64 *Stevenson v. Commonwealth Department of Revenue and Board of Arbitration of Claims, et al*, ____ Pa. Commonwealth Ct. ____, 413 A.2d 667 (1980).

Moreover, contrary to Doraville's assertion, 1 Pa. Code §35.177 (the section of general rules applicable to Pennsylvania's administrative agencies which provides generally for motions for summary judgment and other motions) does apply to this board. In *Lebanon County Sewage Council v. DER*, ____ Pa. Commonwealth Ct. ____, 382 A.2d 1310 (1978), Commonwealth Court applied 1 Pa. Code §35.180 (which deals with answers to §35.177 motions) to this board. If §35.180 applies to this board then, clearly, so does §35.177.

While it should be clear from the above that this board is empowered to grant motions for summary judgment it is, equally, clear from *Summerhill Borough, supra*, that this board should not grant such motions where a genuine issue as to any material fact is outstanding.

In the instant matter there are plenty of hotly contested factual issues including, but not limited to, the acid bearing potential of the proposed mining site. However, the facts material to DER's main argument are not in dispute. In its answer to DER's motion, Doraville admits that its application is deficient if measured against the October 8, 1979 regulations and Doraville again admits at page 8 of its brief that all the information required by the new regulations has not been submitted. It is, thus, clear that no genuine issue of material fact remains outstanding with regard to DER's argument and summary judgment is permitted if DER's legal position is correct.

This analysis brings us to the legal issue dividing the parties. Doraville submits that it is being forced by DER to try to hit a constantly moving target in that DER keeps coming up with new and more sophisticated reasons for denying Doraville's application.

This board is sympathetic to Doraville's plight, but we do not subscribe to Doraville's assertions that DER's amendment of its regulations is a mere tactic employed by DER to avoid a final decision.

In the first place DER per se cannot modify its own regulations as most administrative agencies can. Rather, DER's regulations are promulgated by the Pennsylvania Environmental Quality Board, a body composed of citizens, legislators and the secretaries of other departments of the Commonwealth. 71 P.S. §510-20. Moreover, the specific changes here involved were the result of a review process mandated by Section 303 of the Federal Water Pollution Control Act.

The question remains, however, whether the 1979 amendment to DER's water quality regulations apply to Doraville's 1973 application. In this regard 25 Pa. Code §95.8 as discussed by the parties is interesting but not determinative. Section 95.8 provides that:

> "Whenever there is a change in the provisions of Chapter 93 of this Title (relating to water quality standards) or of this chapter, or whenever the Department adopts a plan or makes a determination which would change existing or impose additional water quality criteria or treatment requirements, it shall be the duty of the permittee of facilities affected thereby, upon notice from the Department, to promptly take steps as shall be necessary to plan, obtain a permit or other approval, and construct such facilities as are required to comply with the new water quality standards or treatment requirements."

DER argues that if permits can be changed by the new regulations clearly applications can. Doraville argues that notice of proposed changes is required under §95.8 and has not been received.

The problem with both arguments is that §95.8 deals with permits rather than applications. This board, in *Wolfe Dye and Bleach Works, Inc. v. DER*, 1978 EHB 215 (f.n. 5 page 220), did find support in §95.6, the virtually identical predecessor of §95.8, for imposing later promulgated regulations on a pre-existing application, however, the board raised the issue of §95.6 *sua sponte* in *Wolfe Dye, supra*, without benefit of briefs. A better view of §95.8 seems to be that this regulation demonstrates, by implication, that the new regulations apply to earlier filed applications since, with notice, these regulations even apply to permits, but §95.8 doesn't per se require that the new regulations apply.

Fortunately, on this issue, the law in Pennsylvania is clear. In *Commonwealth of Pennsylvania, DER v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973), the Pennsylvania Supreme Court adopted the ruling of the United States Supreme Court in *Thorpe v. Housing Authority*, 393 U.S. 268, 89 S. Ct. 518, 21 L.Ed. 474 (1968) to the effect that an appellate court will apply the administrative regulations in effect at the time of review. Moreover, *Harmar, supra*, like the present matter, involved the denial by DER's predecessor of mine drainage applications and so *Harmar, supra*, stands for the proposition that DER must apply its new regulations to review of Doraville's application.

In fact, *Harmar, supra*, is often cited for the proposition that DER is bound to apply the rules promulgated for it by the EQB: see also *Rochez Bros., Inc. v. DER*, 18 Pa. Commonwealth Ct. 137, 334 A.2d 790 (1975).

Nor are *Harmar, supra*, and *Thorpe, supra*, out of the main stream of legal analysis. The United States Supreme Court in *City of Philadelphia v. New Jersey*, 9 ERC 1764 applied the Resource Conservation and Recovery Act of 1976, Pub. L. 94-580, 42 U.S.C. §6901 *et seq.* when reviewing a 1975 New Jersey Supreme Court decision. Likewise, the Pennsylvania Supreme Court, in *Commonwealth v. Barnes and Tucker Coal Co.*, 455 Pa. Commonwealth Ct. 392, 319 A.2d 871 (1974) applied the 1970 amendments to The Clean Streams Law, 35 P.S. §691.1 *et seq.* to a discharge from a mine which had been closed in 1969. The cases cited by Doraville to counter these authorities are quite inapposite. While it may be true that parties cannot change theories on appeal to an appellate court this is quite a different matter from whether new regulations can and, in fact, must be applied. Moreover, review before this board is *de novo; Warren Sand and Gravel Company, Inc. v. DER*, 20 Pa. Commonwealth Ct. 186, 341 A.2d 556 (1975), i.e., we do not act as an appellate court and therefore arguments based upon an appellate court analogy must fail.

Barnes and Tucker, supra, also speaks to Doraville's arguments that DER seeks to apply its regulations retroactively against Doraville. In that matter, Barnes and Tucker Coal Co., made the same argument which Doraville makes here but the Pennsylvania Supreme Court rejected it saying that applying new law to a pre-existing condition is not a retrospective application of that law (see 319 A.2d 871 at 885). If applying new law to a pre-existing discharge is not retroactive, applying it to a pending application would clearly not be.

In the final analysis *Barnes and Tucker, supra*, answers the gist of Doraville's complaint, that it should be entitled to have its application reviewed by 1973 law. The Supreme Court, in *Barnes and Tucker, supra*, clearly enunciated the principle that the law waits for no man and therefore that even the holding of a lawful permit (which Barnes and Tucker did have) did not create a vested right in a continuing discharge when the law changed.

Although, from the above analysis, this board finds that it could grant DER's motion, the board also notes that Pa. R.C.P. 1035 places the grant or denial of such a motion within the discretion of the court and allows the court to grant partial or modified judgments. Because of the extensive hearings already held in the consolidated matters and the virtual certainty of continuing litigation, it would seem unfair to Doraville to extinguish its appeals and thereby expose it to collateral estoppel and other like arguments in likely subsequent appeals. Therefore, this board is entering an order affirming DER's denial of Doraville's present application (which is essentially its 1973 application) but also remanding the matter to DER to give Doraville an opportunity to submit any additional information required by law within ninety (90) days or any longer period which is mutually agreeable to DER and Doraville.

O R D E R

AND NOW, this 12th day of November, 1980, it is ordered that:

1. DER's motion for summary judgment is granted subject to the condition that this board retains jurisdiction of the instant matter and Doraville shall be permitted to supplement its mine drainage application within ninety (90) days from the date of this Order or any longer period which may be mutually agreeable to DER and Doraville. DER is also directed to provide Doraville with all criteria, guidelines and guidance with which other applicants are supplied and is directed to review and respond in writing to Doraville's amended application.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Eugene E. Dice, Esquire
Eugene E. Fike, II, Esquire
Robert Critchfield, Esquire

DATED: November 12, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

E. ARTHUR THOMPSON, et al

Docket No. 79-185-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and WICHARD SEWER COMPANY, INC. and
WICHARD-MILLER JOINT VENTURE, Intervenors

OPINION AND ORDER

On October 16, 1980 this board issued an adjudication in the above-captioned matter. On November 3, 1980 the board received a petition for rehearing or reconsideration.

Rehearing or reconsideration is governed by §21.122 of this board's rules, 25 Pa. Code §21.122, which requires that rehearing may be granted within twenty (20) days after a decision has been rendered. As set forth above, the appellants' petition was filed in a timely manner. Section 21.122, however, goes on to list other criteria necessary to the grant of a petition for rehearing. The petitioning party must state "compelling and persuasive reasons" which demonstrate either that the decision rests on a legal ground not considered by any party or that crucial facts set forth in the application are not as stated in the decision. The appellants' application cites no legal ground in the adjudi-

cation which had not been considered by the parties. It does set forth alleged facts regarding the groundwater supply in Horsham Township which are not as stated in the adjudication. However, §21.122(a)(2) requires that if reconsideration is sought on the basis of crucial facts "...the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have been offered at the time of the hearing."

The appellants' application does discuss and attach an October 8, 1980 resolution of the Delaware River Basin Commission (DRBC) which, obviously, could not have been offered at the time of the hearings on July 7, 1980 and July 8, 1980. However, the DRBC resolution *per se* is not determinative on the issue of the availability of groundwater for Country Springs Development (which was discussed as a peripheral issue to DER's approval of the requested plan approved in the said adjudication); the DRBC did not speak to the availability of groundwater for the proposed development.

The other evidence which the appellants' proffer was all available before the July 1980 hearings, e.g., the alleged removal of wells in March and April and the alleged contamination of other wells with pollutants. The only explanation offered by appellants for not producing this evidence at the hearing was the prior recalcitrance of Mr. Bishop, Manager of the Horsham Township Water Authority. The fact remains that appellants could have, but deliberately chose not to subpoena Mr. Bishop, or other witnesses for the hearing. Since they did not avail themselves of this opportunity they do not qualify for reconsideration pursuant to 25 Pa. Code §21.122.

O R D E R

AND NOW, this 4th day of December, 1980, the appellants' petition for rehearing or reconsideration is denied.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Randall J. Brubaker, Esquire
Mrs. Elizabeth Steele
Herbert K. Sudfeld, Jr., Esquire

DATED: December 4, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ALBERT M. COMLY AND ELIZABETH H. STEELE : Docket No. 80-160-H

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and RONALD S. MINTZ AND PHILIP MILLER, t/a
WICHARD-MILLER JOINT VENTURE AND WICHARD
SEWER COMPANY, INC., Intervenor

OPINION AND ORDER SUR
INTERVENORS' MOTION TO QUASH

The appellants in the instant matter filed an appeal on or about September 26, 1980 from the issuance by DER, on or about November 30, 1979, of NPDES Permit 0050253 to Wichard Sewer Company, Inc. The said corporation and its principals have intervened in this action and have filed a motion to quash appellants' appeal as untimely. The appellants have replied to the intervenors' motion and both parties have briefed what they agree to be the relevant issues raised by the motion: a) Is the issuance of NPDES Permit 0050253 a final action and therefore an appealable event? b) Assuming that issuance of NPDES Permit 0050253 did constitute an appealable event do appellants qualify for an appeal *nunc pro tunc* on the basis of the facts in this case?

A. Issuance of NPDES Permit 0050253 was a final action of DER

As a starting point a bit of historical perspective is necessary to address the first issue. Since 1905, DER and its institutional predecessors have been issuing permits for the discharge of sewage into the waters of the Commonwealth. Since at least 1970, DER's permits have served a dual purpose. In the first place these permits constituted compliance with sections 201 and 202 of The Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§691.201 and 691.202, which forbid the discharge of sewage into the waters of the Commonwealth unless that discharge is authorized by a DER permit. These permits also constituted compliance with Section 207 of The Clean Streams Law, 35 P.S. §691.207, which forbids the construction of sewerage treatment works without a permit.

In 1972, Congress enacted the Federal Water Pollution Control Act (FWPCA), 42 U.S.C. §1251 *et seq.*[1]

Under Section 402 of the FWPCA each point source of pollution had to obtain a National Pollutant Discharge Elimination System (NPDES) permit from the United States Environmental Protection Agency and, pursuant to Section 401(a)(1) of the FWPCA, DER had to furnish EPA with a certification that the discharge would comply with all the requirements of the FWPCA and all relevant state requirements.[2]

---

1. Although the FWPCA was amended in 1977 these 1977 Amendments maintained the basic structure of the FWPCA and did not affect the sections of the FWPCA cited and discussed herein.

2. Relevant state water quality requirements are also requirements of the FWPCA if more stringent than federal technology based standards pursuant to Section 301 of the FWPCA.

During this period DER continued to issue state water quality permits. Thus, Pennsylvania dischargers were required to obtain two different permits from two different agencies for each single discharge.

Eventually, this cumbersome situation was alleviated by the delegation, by EPA to Pennsylvania, of the NPDES permit program. Now DER issues a two-part permit to each approved discharger. Part I of this permit (which sets forth effluent limits) constitutes the old NPDES permit and the old Section 202 Clean Streams permit while Part II of the permit (see 25 Pa. Code §92) (which sets forth construction details) constitutes the old Section 207 Clean Streams Law permit.

This bifurcation of the DER permit process raises in a new context an issue often explored by this board and reviewing courts, i.e., the finality of a DER action. It is clear that only final actions of DER may be reviewed by this board; we simply have no jurisdiction to consider an interlocutory decision. *George Eremic v. DER*, EHB Docket No. 75-283-C (issued December 2, 1976); *Standard Lime & Refractories Company v. DER*, 2 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971); *DER v. New Enterprises Stone & Lime Company*, 25 Pa. Commonwealth Ct. 389, 359 A.2d 845 (1976).

From these cases and from the Administrative Agency Law, 2 Pa. C.S. §101 *et seq.* the test of finality is whether the appealed action changes the legal status quo. Thus, in *Eremic, supra*, an appeal from DER's refusal to revoke a landfill permit which did not change the legal status of either the permittee or of the appellant, a neighboring property owner, was quashed. Similarly, an appeal from DER's refusal to modify a consent order which did not change the appellant's obligation under the consent order was quashed.

On the other hand, in *Wheeling-Pittsburgh Steel Corporation v. Commonwealth, DER*, 27 Pa. Commonwealth Ct. 434, 279 A.2d 383 (1971), DER's certifica-

tion of effluent limits to EPA for a NPDES permit was upheld as a final and, thus, appealable action. (See also *Sharon Steel Corporation v. DER*, 28 Pa. Commonwealth Ct. 607 (1977).) Clearly, the instant situtation is bound by *Wheeling-Pittsburgh, supra*, since the Part I permit here under appeal is an even more final action than the certification appealed in *Wheeling-Pittsburgh, supra*.

B. No facts have been alleged to show that appellants' appeal is untimely

Having decided that issuance of the Part I permit constitutes an appealable action does not, however, mean that the intervenors' motion to quash must be granted. It is also necessary to evaluate the timeliness of the appeal.

Here there is no contest that the appeal was filed some 10 months after the Part I permit issued. The only question is whether that appeal is untimely. Pursuant to 25 Pa. Code §21.52(a):

> "(a) Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pensylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section."

The action in question is the issuance of the Part I permit; therefore, the question is, did the appellants receive written notice of this action or, alternatively, was notice of "such action" published in the Pennsylvania Bulletin? From the motion to quash and reply, it is clear that notice of DER receipt of the application for the NPDES permit was published on October 6, 1979 in the Pennsylvania Bulletin but there is no allegation that notice of the issuance of the permit was ever published. Acceptance of the application and issuance of

the permit are, obviously, two different actions. DER's Chapter 92 regulations contemplate a public comment period following publication of the first notice so that the permit issued (if any) might differ from the application issued. In fact, it would not appear that appellants could have appealed from DER's decision before it had issued the permit.

As to written notice, the intervenors have alleged and appellants have admitted that, on or about October 25, 1979, one of the appellants, Mrs. Elizabeth Steele, sent a letter to DER concerning the proposed sewage treatment plant. Mrs. Steele, however,adamantly refuses to concede that this letter constituted proof that she or any other appellant knew of the imminent issuance of the NPDES permit. Her succeeding course of conduct, including her correspondence with DER officials, seems to bear out her view on this issue.

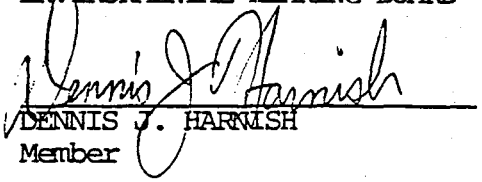
In any event, if there is no allegation in the motion to quash that any of the appellants received any written notice of the issuance of the Part I permit prior to 30 days from the instant appeal. Thus, there are no facts alleged upon which this board can find that appellants' appeal is untimely under 25 Pa. Code §21.52. Consequently, the intervenors' motion to dismiss must be denied.

Since the motion is denied as failing to show untimeliness this board need not and will not reach the *nunc pro tunc* issue.

O R D E R

AND NOW, this 4th day of December, 1980, the intervenors' motion to quash is denied and the parties are directed to file their pre-hearing memoranda on or before December 22, 1980.

ENVIRONMENTAL HEARING BOARD



DENNIS J. HARMISH
Member

cc: Bureau of Litigation
Randall J. Brubaker, Esquire
Mrs. Elizabeth Steele
Herbert K. Sudfeld, Jr., Esquire

DATED: December 4, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SENATOR J. WILLIAM LINCOLN and REPRESENTATIVE FRED TAYLOR : Docket No. 80-107-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and ELWIN FARMS, INC., Permittee

OPINION AND ORDER SUR
MOTION TO DISMISS APPEAL

On May 2, 1980 DER issued a solid waste permit under the Pennsylvania Solid Waste Management Act, Act of July 31, 1968, P.L. 788, *as amended*, 35 P.S. §6001, *et seq.* to Elwin Farms, Inc. for a facility in Franklin Township, Fayette County, Pennsylvania. Notice was given on May 24, 1980, and this appeal was filed on June 25, 1980. Appellants are members of the Senate and House of Representatives of Pennsylvania respectively, but own no property within miles of the proposed solid waste disposal site. On July 21, 1980 permittee, Elwin Farms, Inc., filed a motion to dismiss the appeal based on a lack of standing.

Appellants rely upon *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168 and a number of other cases[1] decided prior to the decision

1. We find no support for appellants in the federal cases decided under more liberal standing rules, such as *Sierra Club v. Morton*, 405 U.S. 727 and *U.S. v. SCRAP*, 412 U.S. 669 (1973).

of our Commonwealth Court in *Strasburg Associates v. Newlin Township*, ____ Pa. Commonwealth Ct. ____, 415 A.2d 1014 (1980). In the *Newlin Township* case the Court said:

> "...The Township asserts a host of claims in an effort to show that its direct, immediate, and substantial interests are threatened by the improper design, construction, and operation of the landfill. Most are directed toward such alleged interests as the protection of surface and groundwater resources for residential, commercial, and industrial uses, avoiding the creation of nuisances, and assuring land use compliance with local land use planning. However, standing must again be denied. We cannot extend standing to a Township with the purported interest of protecting the health, safety and general welfare of its citizens without its having met the requisite tests. The Township has failed to show how DER's actions have adversely affected its municipal functions directly, immediately or substantially."

We believe this language applies with equal force to appellants here.

The Board is not unmindful of the fact that another appeal[2] from the issuance of the very same permit here in question has been filed and is presently pending before the board. Because of this, we need not decide whether the motion should be denied under the reasoning of *Costopoulos v. Thornburg*, 487 Pa. 438 as urged by appellants, because the issue will not otherwise escape review, as in that case. We therefore enter the following.

---

2. *Turner, et al v. DER and Elwin Farms, Inc.*, EHB No. 80-088-B.

O R D E R

AND NOW, this 4th day of December, 1980, the motion to dismiss the appeal of Senator J. William Lincoln and Representative Fred Taylor is hereby granted.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Howard J. Wein, Esquire
Senator J. William Lincoln
Representative Fred Taylor
Robert J. Shostak, Esquire

DATED: December 4, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

R. CZAMBEL, SR. : Docket No. 80-152-B

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and INDEPENDENT ENTERPRISES, Permittee

OPINION AND ORDER SUR
MOTION TO QUASH APPEAL

On August 12, 1980 DER granted Independent Enterprises, Inc. (Enterprises) a permit to construct and maintain a multi-plate arch culvert in Thoms Run, South Fayette Township, Allegheny County. On September 18, 1980 the board received a mailgram from appellant, reading:

> "We wish to inform the Environmental Hearing Board that we are appealing the issuance of Permit No. ENC 02-58 that was issued to Independent Enterprises, Inc. Box 221 Bridgeville, Pa. 15017. The appeal papers will be returned to your office as soon as they arrive."

The board treated this mailgram as the filing of an appeal under its Rule 25 Pa. Code 21.51(a), assigned a docket number, and on September 19 sent appellant its standard "Acknowledgement of Appeal" form requesting the further information required by Rules 21.51(b) - (f), with the warning that the appeal might be dismissed if the requested information was not furnished by appellant within ten days.

Enterprises, in its motion and supplemental motion to quash the appeal, grants that the September 18, 1980 mailgram constituted a filing of an appeal (see paragraphs 7 and 10 of Enterprises' motion and paragraph 6 of its supplemental motion). However, Enterprises affirms that it never received a copy of the mailgram, an affirmation not denied by appellant. A properly completed notice of appeal, containing all the information required under Rule 21.51, was not received by the board until October 8, 1980, after the board--on October 2, 1980--had sent appellant a second request for the required additional information; a copy of this notice of appeal was mailed to Enterprises by appellant on October 4. Thereafter Enterprises moved to quash the appeal on a number of grounds, which in essence are:

(1) The appeal was not filed until after the 30-day period specified by 25 Pa. Code 21.52(a).

(2) Because notice of the appeal was not served on Enterprises until October 4, 1980, more than 10 days after the board received the September 18, 1980 mailgram, the appeal was not properly perfected, in violation of Rules 21.52(b) and 21.51(f)(3).

(3) A copy of the appeal was not sent to the DER office which issued the permit until October 6, 1980, in violation of the 10-day requirement of Rule 21.51(f)(1).

(4) Appellant failed to supply the information requested by the board until October 8, more than 10 days after the board first requested this information on September 19, 1980.

(5) Enterprises, which at considerable cost has completed or nearly completed construction of the culvert, is substantially prejudiced and harmed by appellant's failure to timely file and perfect his appeal.

For reasons set forth below, these grounds are rejected, and the motion is denied.

Rule 21.52(a) reads:

> "Except as specifically provided in §21.53 of this title (relating to appeal *nunc pro tunc*), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the *Pennsylvania Bulletin* unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section."

As the Rule itself states, and as our courts have held, the requirements of Rule 21.52(a) are jurisdictional. *Rostosky v. DER*, 26 Pa. Comm. 478, 364 A.2d 761 (1976); *Lebanon County Sewage Council v. DER*, 34 Pa. Comm. 244, 382 A.2d 1310 (1978). The board has jurisdiction over the appeal if the 30-day requirement is met and if the appeal is perfected in accordance with the requirements of Rule 21.52(b). It is clear from Rules 21.52(b) and 21.52(c) that service of notice of the appeal on the permittee is the only essential requirement for perfection of the appeal. The Rules do not specify any fixed time period (akin to the 30-day time period for filing) within which the appeal must be perfected in order that jurisdiction may attach.

In the instant action, appellant never received written notice that permit ENC 02-58 had been granted by DER. The record does not show when notice of DER's action was published in the Pennsylvania Bulletin, but the board, as permitted by 25 Pa. Code 21.109, has taken judicial notice of the fact that the date of publication was August 23, 1980 (10 Pa. Bull. 3471). Therefore the September 18, 1980 mailgram, accepted by the board and by Enterprises as the filing of an appeal, was received by the board within the thirty-day period required by Rule 21.52(a), which period (according to 25 Pa. Code 21.1(c) and 1 Pa. Code 31.12) expired September 22, 1980. It follows that Enterprises' ground (1) for quashing the appeal must be rejected.

The board's present Rules of Practice and Procedure, 25 Pa. Code 21.1 *et seq.*, became effective August 1, 1979. Sections 21.51 - 21.53 of the present Rules replace Section 21.21 of the previous Rules. Section 21.51(f)(3) of the present Rules, requiring appellant to serve a copy of his notice of appeal on the permittee within 10 days after filing his appeal, repeats the requirement in Section 21.21(b)(3) of the former Rules. Section 21.21(d) of the former Rules read:

> "Failure to comply with this section shall be a sufficient basis for dismissing the Appeal. The actions of the Department of local agency shall be final as to any person who fails to file an appeal or to perfect an appeal pursuant to this section."

On the basis of the language just quoted, the board in the past has held that failure to serve a copy of the notice of appeal on the permittee within the time period specified by the Rules required quashing of the appeal. *Allegheny River Protective Association, Inc. v. DER*, EHB Adjudication, Docket No. 73-452-C (issued August 12, 1975).

The language of Section 21.21(d) of the former Rules has been dropped from the present Rules, however. Consequently, it is the plain meaning of the present Rule 21.52(a) that failure to perfect the appeal within ten days after filing the appeal, by serving a notice of appeal on the permittee, does not have the board's jurisdiction over the appeal. The board's jurisdiction cannot attach until the appeal is perfected by service of the notice of appeal, but once the appeal has been perfected the board can take jurisdiction if the appeal has been filed within the 30-day period specified in Rule 21.52(a).

Whether the board should take jurisdiction depends on whether the interval between filing of the appeal and its perfection has been unreasonably long. This standard, applicable in circumstances when (as in the board's present Rules) there

is no fixed time limit within which the appeal must be perfected, has been articulated by our Supreme Court in several analogous cases. *Hodge v. Me-Bee Co.*, 429 Pa. 585, 240 A.2d (1968); *Fortieth St. and Fairmount Ave. Church of God v. Hawes*, 437 Pa. 407, 263 A.2d 344 (1970). In particular, the *Hodge* opinion states:

> "Section 4 of the Act of 1897, as amended by the Act of March 12, 1925, P.L. 32, provides that appeals must be filed within three calendar months from the entry of the order appealed from (in this case the order was entered January 26, 1967, thus making the final day for filing April 26, 1967); however, neither section 4 nor section 2 sets a mandatory time limit for perfection of this appeal. Nevertheless, this Court has held that while the appeal need not be perfected within the three month period for filing, it must be perfected within a reasonable time thereafter, or else be quashed." (Emphasis in the original)

In the instant action, Enterprises was served with notice of the appeal on October 4, 1980 (see Rule 21.33(a)). This date is only 16 days after the appeal was filed on September 18, 1980, and a mere six days past the 10-day period allowed for such service under Rule 21.51(f)(3). In the board's opinion, these dates do not warrant the holding that appellant waited an unreasonable time before perfecting his appeal, especially in view of the Pennsylvania Code's general precept (1 Pa. Code 31.2) that the rules shall be liberally construed to secure a just determination of the issues. Therefore Enterprises' ground (2) for quashing the appeal is rejected. For similar reasons, Enterprises' grounds (3) and (4), which are based on relatively trivial Rule violations that in no way prejudiced Enterprises, also are rejected.

As for Enterprises' ground (5) for quashing the appeal, it is possible that Enterprises has been substantially prejudiced by appellant's delay in giving notice of his appeal. However, this possibility cannot be the basis for quashing the appeal. Moreover, it is not clear that Enterprises changed its position in reliance upon appellant's delay in giving notice. There is no allegation that Enterprises awaited the termination of the 30-day appeal period before it began

construction. If Enterprises began construction within the 30-day period it was, of course, assuming the risk of an appeal and a subsequent modification or renocation of its permit.

O R D E R

AND NOW, this 11th day of December, 1980, it is hereby ordered that the motion to quash the appeal of Roy Czambel, filed by Independent Enterprises at EHB Docket No. 80-152-B, is hereby denied.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis J. Harnish

DENNIS J. HARNISH
Member

DATED: December 11, 1980

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Harry S. Rosenthal, Esquire
R. Czambel, Sr.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GILBERT L. JR. & JOYCE B. LONGWELL, et al : Docket No. 80-002-W

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and NEWBERRY TOWNSHIP SUPERVISORS, Permittee

OPINION AND ORDER SUR
MOTIONS TO DISMISS APPEAL

Appellants all are residents of Cragmoor Village, a subdivision within Newberry Township, York County. In the fall of 1978, DER, after receiving many complaints of malfunctioning on-lot sewage systems from residents of Newberry Township, ordered the Township to prepare a revised Official Sewage Facilities Plan. On August 14, 1979 the Township finally adopted a revised plan. On September 28, 1979 DER approved that portion of the plan pertaining to the western region of the Township, but disapproved the plan for the Township's eastern region. Cragmoor Village lies in the disapproved eastern region. On November 4, 1979, after further discussions with the Township, DER decided to approve the entire Township plan with the sole exception of that portion of the plan pertaining to Cragmoor Village. Seven individual appeals of this action of DER's were filed.

The Longwells also have filed an appeal (hereinafter the Longwell appeal) alleging that DER failed to respond to a private request for plan revision made pursuant to 25 Pa. Code 71.17(a). All these appeals were consolidated on January 25, 1980. Now, after lengthy settlement discussions failed to resolve the dispute, DER and the Township have moved to dismiss all the consolidated appeals for lack of standing, and to dismiss the Longwell appeal for failure to comply with the requirements of 25 Pa. Code 71.17(a) and of Section 5(b) of the Pennsylvania Sewage Facilities Act, 35 P.S. 750.5(b).

The criteria for standing have been set forth by our Supreme Court in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975), as follows:

> "[O]ne 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 connect between the challenged action and the asserted injury to qualify the interest as 'immediate' rather than 'remote'."

DER and the Township argue that the appellants do not have standing to file their individual appeals under this standard because whereas the appellants are residents of Cragmoor Village the action of DER being appealed is an approval of the sewage plan revisions for areas of the Township other than Cragmoor Village. This argument is specious. Although it is true that many of the inartfully pleaded individual appeals, completed by the appellants *pro se* without the assistance of counsel, suggest the appellants are seeking solely to overturn the plan approval, but it is apparent from the record that the gravamen of the appellants' complaint is DER's exclusion of Cragmoor Village from the approved plan area. The Kinsey appeal, Docket No. 80-007-W, explicitly states:

> "In view of the close proximity to the expected sewers and the many problems being experienced by home owners in Cragmoor Village, it is requested that Cragmoor Village be included in the area of the proposed sewer project."

It is concluded that appellants do have standing to prosecute their individual appeals. As for the Longwell appeal, 25 Pa. Code 71.17 clearly gives the Longwells standing to appeal DER's refusal to even respond to their private request for a DER order to Newberry Township requiring revision of the Township's plan for Cragmoor Village so as to meet the sewage disposal needs of the Cragmoor Village area. The motions to dismiss for lack of standing are rejected.

In the board's view DER and the Township have inadequately supported their argument that the Longwell appeal fails to comply with the requirements of 25 Pa. Code 71.17(a). The Longwell appeal makes reference to Mr. Longwell's letter to DER dated August 15, 1979, the day after the Township adopted its revised plan. This letter clearly alleges the Township's August 14 plan will not meet the needs of Cragmoor Village residents, and gives reasons for this allegation; whether these reasons were or were not cogent is irrelevant here because the Longwells never received the response from DER required by Section 71.17(d).

DER and the Township also argue that the Longwell appeal must be dismissed because there has been no showing of compliance with 35 P.S. 750.5(b), which states the request to DER to order the Township to revise its official plan must be preceded by a prior demand upon and refusal by the municipality (in this instance the Township) to perform the requested revision. Indeed the Longwells have not made this showing. However, nothing in Section 750.5(b) requires that the private request for revision must state on its face that such a demand was made or that such an allegation need be contained in a notice of appeal from DER's refusal to order a plan revision. Indeed, 25 Pa. Code §71.17 which sets forth what must be contained in a private request for revision, does not require such an allegation.

It seems highly unlikely, that Longwell would have pursued his present time consuming and expense of counsel of action unless the Township had already

refused to revise its plan on his request. However, this is if anything a matter to be considered at the hearing on the merits rather than at this stage of the proceeding.

O R D E R

AND NOW, this 11th day of December, 1980, it is hereby ordered that the motions to dismiss, filed by the Commonwealth and by Newberry Township, be denied for each and every appeal consolidated under EHB Docket No. 80-002-W.

ENVIRONMENTAL HEARING BOARD

PAUL E. WATERS
Chairman

DATED: December 11, 1980

cc: Bureau of Litigation
William R. Sierks, Esquire
Terry R. Bossert, Esquire
C. Kent Price, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EDWARD WAYNE BUTZ : Docket No. 80-144-H

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and EAST LAMPETER TOWNSHIP SEWER AUTHORITY, Permittee

OPINION AND ORDER

The instant appeal was filed on or about September 11, 1980 from DER's issuance of sewer extension permit No. 3679419 on or about June 6, 1980. The sewer extension authorized by DER would permit the connection of twenty-seven existing houses to the East Lampeter Sewer Authority's sewer system.

DER has moved to dismiss the instant appeal as untimely and the appellant, apparently without the assistance of counsel, has responded to DER's motion in an informal manner. Nevertheless, it does appear that on June 7, 1980 the major substantive provisions of a settlement agreement before DER and East Lampeter Township Sewer Authority were published in a notice in the Pennsylvania Bulletin. This notice stated that "The DER will issue a sewage extension permit, but connections to the extension will be limited to 27 existing homes documented as public health hazards." The said notice called for appeals from the settlement

agreement to be filed within 20 days of the publication.

DER argues that since the appellant's appeal was not filed within twenty (20) days of the published notice it is untimely.

The appellant's rejoinder is that he did not see the notice in the Pennsylvania Bulletin, a publication he does not receive, and that he did appeal within 30 days from receipt of a letter from East Lampeter Township informing him that DER had issued the permit to construct sewers in his area.

In the ordinary case, the appellant's arguments would not prevail; 25 Pa. Code §21.53(a) clearly acknowledges publication in the Pennsylvania Bulletin as legally effective notice. Moreover, this board simply has no jurisdiction over an untimely appeal and therefore no discretion to consider equities which may favor the appellant. *Rostosky v. Commonwealth of Pennsylvania, DER*, 26 Pa. Commonwealth Ct. 478, 364 A.2d 761 (1976); *Charles J. Bonzer v. DER*, EHB Docket No. 80-133-B (issued September 24, 1980).

In this case, however, two factors are present which tip the balance in favor of the appellant. First of all, as quoted above, the notice published in the Pennsylvania Bulletin indicates that a permit "will be issued", when, in fact, it already had been issued by DER as of the date of publication. The board does not imply that this notice was deliberately misleading but, clearly, one could have been misled by this notice in awaiting the issuance of the permit and notice of this issuance as the appealable event. Apparently, no separate notice of the issuance of the permit was ever published. Thus, the appellant was never advised, by publication in the Pennsylvania Bulletin, of the event he would challenge here; the issuance of the permit and therefore the requirements of §21.53(a) have not been met by DER.

In addition, Mr. E. Wayne Butz, received correspondence from DER in the past concerning the proposed sewer extension. (See the letters of May 18, 1979 and November 2, 1979 attached to the Notice of Appeal.) In fact, the November 2, 1979 letter was a copy of DER's denial of the sewer extension permit (upon the appeal of which action the settlement agreement in question here was based.)

Although specific notice is not required by the law or regulations, where, as here, there has been on-going course of conduct which would encourage a citizen in the appellant's position to assume that he would be notified of any further developments regarding the proposed sewer system extension, it would seem to constitute a breakdown in the official machinery of the type contemplated in 25 Pa. Code §21.53 for DER to avoid sending personal notice of the grant of the permit in question.

O R D E R

AND NOW, this 15th day of December, 1980, DER's motion to dismiss is hereby denied.

ENVIRONMENTAL HEARING BOARD

Dennis J. Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Lynn Wright, Esquire
Edward Wayne Butz
William E. Chillas, Esquire

DATED: December 15, 1980

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GEORGE CAMPBELL, et al and SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION and ARTHUR SCOTT	Consolidated Docket No. 76-117-H Docket Nos. 76-117-H 80-012-H 80-031-H 79-121-H
* * * *	
SUSQUEHANNA COUNTY BOARD OF COMMISSIONERS v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and LYNCOTT CORPORATION	Docket Nos. 80-105-H 80-116-H 80-138-H 80-172-H

OPINION AND ORDER

This is the third opinion and order issued by this board regarding most of the above-captioned matters. (It is only the first such order for 80-172-H.)

The original appeal of those set forth in the caption was the appeal filed at 76-117-H on September 3, 1976, by George Campbell and eleven other persons, from the issuance by DER of Solid Waste Permit No. 101025 and Industrial Waste Permit No. 5876201 which permits approved the operation of a sanitary landfill on 70 acres of land in New Milford Township, Susquehanna County. Lyncott Corporation, of which the permittee Arthur Scott is a principle officer, operates said landfill and has intervened in all the above matters.

A. 76-117-H Motion to Dismiss Susquehanna County

Susquehanna County filed a petition to intervene in this appeal, and Lyncott filed a motion to quash the County's petition to intervene. On February 1, 1980 this board issued an opinion and order granting Susquehanna County's petition to intervene and denying Scott's motion to quash the said petition. Subsequent to the February 1, 1980 opinion and order, Commonwealth Court issued a decision regarding the standing of a municipality to appeal from DER's issuance of a solid waste permit to this board, *Strasburg Associates v. Newlin Township*, _____ Pa. Commonwealth Ct. _____, 415 A.2d 1014 (1980).

Lyncott requested a reconsideration of the board's February 1 opinion on the basis of *Strasburg* and on October 14, 1980 Lyncott's motion to dismiss the County's petition to intervene was again denied.

The Honorable Thomas M. Burke who was the board member who drafted both of the above opinions[1] has recently resigned from the board and all of the above-captioned matters have been reassigned to board member Dennis J. Harnish. Now, Lyncott has again moved this board to reconsider (this time *en banc*) its motion to dismiss.

The board will not grant this request for the following reasons:

First of all, under the board's rules providing for rehearing or reconsideration, 25 Pa. Code §21.222(a), rehearing or reconsideration shall not be granted unless either the decision rests on a legal ground which the parties did not have an opportunity to brief or crucial facts as set forth in the application are not as stated in the decision. In the present matter neither of the above criteria has been satisfied. We haven't yet proceeded to a hearing on the merits in this matter so the board's opinions have, obviously, rested solely upon procedural (rather than substantive) facts; none of which is in dispute. Moreover, Lyncott's brief

---

1. The February 1, 1980 opinion was signed by both the then present board members.

on reconsideration stresses *Strasburg, supra*, which was, of course, briefed prior to the October 14, 1980 opinion. [See with regard to reconsideration, the board's opinion in *E. Arthur Thompson, et al v. DER*, EHB Docket No. 79-185-H (issued December 4, 1980)].

The board, notwithstanding the above, might be more inclined to grant reconsideration if the moving party had clearly demonstrated that the board's October 14, 1980 opinion was in error; this was not the case. The key issue is whether intervention pursuant to the board's Rule 21.62 is governed by the same standing standards as apply under the board's Rule 21.52.

Lyncott has cited no authority on this issue. The Commonwealth, in its memorandum of law in support of permittee's petition for reconsideration, has cited several opinions but none of these seem determinative. It is true, of course, as stated by DER, that the board, in *Township of Middle Paxton v. DER, et al*, EHB Docket No. 80-122-W (December 2, 1980) denied a permit for leave to intervene filed by Dauphin County, but the implication drawn from this order by DER is belied by the board's opinion and order at the same caption (issued November 3, 1980) wherein the board deferred action on a motion to dismiss Middle Paxton Township as an intervenor to the same proceeding.[2]

DER's citation of *Centennial School District v. Commonwealth, Department of Education*, 47 Pa. Commonwealth Ct. 428, 408 A.2d 211 (1979) is also inapposite. As DER admits, the *Centennial* decision does not state what, if any, administrative rules of intervention were being considered by the Court. Clearly, however, the rules of this board were not being considered in *Centennial, supra*, and so that decision has no determinative force here.

---

2. Thus, the board's decision not to permit the County's intervention was based on the question of adequacy of representation, i.e., what could the County add as a party to the hearing when a citizens group and a township were already parties.

The board's own research has verified Mr. Burke's determination that there is a difference between the standing necessary to initiate an administrative action and that necessary for intervention in an on-going action. Kenneth Culp Davis, the authorative commentator on administrative law, in Section 22.08 of his Administrative Law Treatise, has explored the relationship between standing and intervention. Mr. Davis notes:

> "The central problem of intervention is usually the disadvantage to the tribunal and to other parties of extended cross-examination...No constitutional restrictions affect intervention; standing to obtain review is substantially affected by the constitutional requirement of case or controversy. Intervention means mere participation in a proceeding already initiated by others; obtaining judicial review means instituting an entirely new judicial proceeding."

Thus, Mr. David found that in a number of cases parties who had rightfully intervened in administrative proceedings were held not to have standing to obtain judicial review of administrative decisions growing out of those proceedings or to initiate proceedings on their own. *Pittsburgh and West Virginia R.R. v. U.S.*, 281 U.S. 479, 486; 50 S. Ct. 378, 381; 74 L. Ed. 980 (1930) also see *Boston Tow Boat Company v. U.S.*, 321 U.S. 632, 64 S. Ct. 776, 88 L. Ed. 975 (1944).

Even under the presumably less liberal criteria of the Pennsylvania Rules of Civil Procedure, intervention has been granted to parties who probably did not have standing to initiate legal actions. Pursuant to Pa. R.C.P. 2327(4) a person not a party to an action shall be permitted to intervene therein if "...(4) the determination of such action may affect any legally enforceable interest of such person..."

As per Goodrich-Amram 2d §2327:7 p. 374, discussing Pa. R.C.P. 2327(4):

> "The exact boundaries of the legally enforceable interest are not clear. It owes its origin to the desire of courts to prevent the curious and the meddlesome from interfering with litigation not affecting their rights. The result is a flexible, although uncertain rule whose application in a given case calls for careful exercise of discretion and a consideration of all the circumstances involved."

It is clear that the interests of Susquehanna County in the above-docketed matter arise above those of the merely curious and meddlesome and thus, on the theory stated above, the County should qualify for intervenor status pursuant to Pa. R.C.P. 2327(4). Moreover, the only relevant citation under Pa. R.C.P. 2327 would seem to support the County's right to intervene. In *Tri-Township Citizens Association v. Strausbaugh*, 64 D & C 2d 256, 15 Adams L. J. 191 (1974), the issue before the Adams County Court was whether the County could represent the interests of its citizens and taxpayers with regard to the appeal from a township's approval of a subdivision plan for the Charnita development. A citizens group opposed to the development was vigorously contesting the township's approval while, it appeared to the court, that the township was not defending its approval. Thus, the Court after discussing the projected income and tax receipts from Charnit and the possible loss in value of the Charnita lots owned by County residents if the subdivision plan were overturned, permitted the County to intervene.

Clearly, the interests of Susquehanna County in the instant matter are at least as immediate, substantial and direct as those of Adams County in the matte discussed above and thus, the intervention of Susquehanna County would seem to be supported by the reasoning of *Tri-Township, supra*.

B. 76-117-B Motion to Dismiss George Campbell, et al

Lyncott, on October 2, 1980, also moved to dismiss the appeals of George Campbell and the other individual appellants. On November 10, 1980 the board received copies of an entry of appearance of counsel on behalf of individual appellants and a request for an extension of time in which to respond to Lyncott's motion to dismiss. The board ordered the parties to file replies and briefs concerning this motion on or before December 5, 1980 and on December 5, 1980 the

board received the answer and brief of the individial respondents. On the basis of these facts alone it is clear that the individual appellants have been actively prosecuting their appeal; the long periods of inactivity in this matter appear to be the result of the attempts of this board and the parties to amicably resolve the dispute. In these circumstances, dismissal of the individual appellants' appeals seems far too harsh a response to any delay their lack of counsel may have caused. Particularly, this is so since Lyncott has not even averred any prejudice by reason of the delay and, on the contrary, would have seemed to have benefited by the operation of the landfill since 1976.

C. Motions to Dismiss Susquehanna County's appeals at 79-121-H; 80-012-H; 80-031-H; 80-105-H; 80-116-H; and 80-138-H

Prior to its amendment this summer, the Pennsylvania Solid Waste Management Act, 35 P.S. §§6001 *et seq.*, did not provide for the disposal of hazardous wastes designated as such.

Instead, DER attempted to cope with the problem of hazardous wastes by issuing solid waste permits and then supplementing these permits with specific permissions to dispose of hazardous wastes at the permitted site.

In the present matter, DER, from time to time, has issued specific approvals to Stabatrol Corporation to dispose of specified chemical wastes at the Lyncott landfill. The County (but not the individual appellants) has appealed from the issuance of six of the said approvals at the docket numbers set forth immediately above. It would appear that these approvals amount to permit modifications and thus are appealable actions. On the other hand, it would also appear that these actions are governed by the *Strasburg* decision with regard to the County's standing since each of these modifications occurred under the "old" Solid Waste Management Act.

The board's opinion of October 14, 1980 makes no attempt to distinguish *Strasburg, supra*, with regard to these appeals but cites the possibility of confusion as a reason to avoid dismissing these appeals. Since I believe that these appeals are governed by *Strasburg, supra*, I believe they must be dismissed since standing is a jurisdictional issue so that, even if dismissing these appeals results in greater confusion in trying EHB 76-117-H, these appeals still cannot be considered by this board. *Wayne J. Busfield, et al v. Commonwealth of Pennsylvania DER and George Kuehnle and the City of Philadelphia*, EHB Docket No. 77-128-W, (decided September 26, 1980) and *Franklin Township and County of Fayette v. Commonwealth of Pennsylvania, DER and Elwin Farms, Inc.*, EHB Docket No. 80-090-B, (decided October 15, 1980); *Borough of Jefferson v. Commonwealth of Pennsylvania, DER and Fern Valley Industries*, EHB Docket No. 79-065-B (issued November 26, 1980).

D. Motion to Dismiss Susquehanna County's appeal at 80-172-H

The final matter to discuss herein is the permittee's motion to dismiss the County's appeal docketed at EHB Docket No. 80-172-H. This appeal, like the others discussed immediately above, involves the County as the sole appellant and is from a DER letter allowing the disposal of certain industrial waste at the Lyncott site. The only point of distinction between this situation and those discussed immediately above is that the DER action appealed at 80-172-H took place on September 19, 1980.

The new Solid Waste Management Act, Act No. 1980-97 which was enacted July 5, 1980, 35 P.S. §§6018.101 *et seq.*, became effective September 5, 1980. Thus the DER action which has been appealed at 80-172-H must be governed by the new Act rather than by the Act interpreted by Commonwealth Court in *Strasburg, supra*.

This is a distinction of some importance since, in Section 504 of the new Act, counties are given specific review and recommendatory powers with regard to permits for the disposal of hazardous wastes.

We need not and do not decide here whether the new Act does legislatively overrule *Strasburg, supra*, and therefore grant the County standing. We do, however, find that Section 504 sufficiently beclouds *Strasburg, supra*, as to encourage us to defer any decision on Lyncott's motion to dismiss 80-172-H pending a hearing on the merits. (See *Middle Paxton Township, supra*.) Of course, we would expect the parties to again address the issue of the County's standing in 80-172-H in their post-hearing briefs.

We should note further, at this point, that 80-172-H will be consolidated for hearing with 76-117-H since both appeals question DER's approval of the disposal of certain types of industrial waste (which may be hazardous waste under the new Act's definition) at Lyncott's Miford Township site.

O R D E R

AND NOW, this 19th day of December, 1980, it is hereby ordered that:

1) Lyncott's motion to dismiss the intervention of Susquehanna County at EHB Docket No. 76-117-H is denied.

2) Lyncott's motion to dismiss the appeals filed by George Campbell, et al at EHB Docket No. 76-117-H is denied.

3) Lyncott's motions to dismiss the appeals filed by Susquehanna County at EHB Docket Nos. 79-121-H, 80-012-H, 80-031-H, 80-105-H, 80-116-H, 80-138-H are granted.

4) Action is deferred on Lyncott's motion to dismiss the appeal filed by Susquehanna County at 80-172-H and the motion to strike filed by Lyncott at this caption is denied.

5) The appeal at EHB Docket No. 76-117-H is consolidated with the app at EHB Docket No. 80-172-H.

6) George Campbell and the individual appellants shall file their pre-hearing memorandum in 76-117-H on or before January 12, 1981.

7) Compliance by Susquehanna County with Pre-Hearing Order No. 1 issu in 80-172-H is continued until January 12, 1981; otherwise the said order remains effective.

ENVIRONMENTAL HEARING BOARD

Paul E. Waters

PAUL E. WATERS
Chairman

Dennis Jay Harnish

DENNIS J. HARNISH
Member

cc: Bureau of Litigation
Louis A. Naugle, Esquire
Gerald C. Grimaud, Esquire
Robert J. Shostak, Esquire

DATED: December 19, 1980